SUMMARY

The Department of Energy (DOE) proposal for a tiered reporting and "registry" system with no incentives is severely, if not fatally, flawed, and is unworkable for the electric utility industry. Specifically, the proposed revision fails to treat project-based reductions and entity-wide reductions equally, and fails to provide incentives or recognition such as transferable credit, baseline protection and credit for past actions.

First, the DOE proposal is inconsistent with section 1605(b) of the Energy Policy Act (EPAct) and presidential policy announced in February 2002, and fails to serve and reflect the multiple purposes of the Energy Information Administration (EIA) section 1605(b) data base. With regard to the power sector's commitment to meeting the President's policy, the extent to which the power sector's actions can be tracked through reports to the section 1605(b) EIA data base depends upon the design of the guidelines and the degree to which participation in the data base is encouraged. The design of the guidelines will have a significant impact upon the degree of participation, the ability to monitor various types of voluntary actions, and ultimately, the level of achievement of the power sector goal.

Second, a unitary data base that encompasses both entity-wide and project-based reports is preferable to a tiered reporting and "registry" system. A tiered reporting and "registry" system is inconsistent with the EPAct and raises a host of problems.

Project-based activities should receive equal treatment with entity-wide actions in a unitary reporting data base because: the statute specifically authorizes and focuses on the reporting of projects; a project-based approach recognizes that a ton is a ton; a project-based reporting approach is more consistent with company actions that focus on reducing greenhouse gases (GHGs) than an entity-wide reporting approach; GHG emissions trading market realities support project-based reporting, and project-based activities can be appropriately "registered" or recognized within a unitary data base.

It is important to emphasize that the section 1605(b) data base is the national federal repository of voluntary GHG emissions and emissions reductions reporting information. As companies consider additional voluntary GHG reduction initiatives and partnerships, they will be more likely to participate if they know that there will be a single EIA-run repository for information and one set of guidelines to follow.

The proposed revision lacks incentives or recognition and is inconsistent with the President's policy, the four-agency letter of July 2002, and statements by the Council on Environmental Quality chairman at a 2002 DOE workshop. The combination of a tiered reporting and "registry" system with no incentives could well jeopardize the success of voluntary programs. Ironically, DOE has proposed a reporting system that, at best, serves the interests of a few companies undertaking voluntary actions, while ignoring entire industries and sectors and the thousands of companies that are participating in DOE's own Climate VISION program.

Moreover, the entity-wide reporting rules are unduly prescriptive and unworkable for the electric utility industry. Biases against entity-wide emissions reporting based on absolute tons and against certain types of emissions reductions activities (such as plant or facility closings) should be eliminated. The so-called "offsets reductions rule" would create barriers to "registration" or recognition of entity-wide emissions reductions and disincentives to participation in voluntary programs.

The rules governing entity-wide emissions inventories are unduly rigid and onerous. The requirement that **all** sources, **all** sinks and **all** GHGs be included in emissions inventories is particularly burdensome since the *de minimis* rule is of no help to large entities.

Reporting should focus on direct emissions and direct emissions reductions. The reporting and "registration," or recognition, of indirect emissions and indirect emissions reductions should be optional. In particular, the reporting of purchased power emissions should be optional. And we note that avoided emissions are generally a form of direct emissions reductions.

Further, the base year and baselines need flexibility. A definition of "reductions" that means emissions reductions, avoided emissions and sequestrations is useful and needed. And the double counting provisions are both impractical and unreasonable.

For a host of sound policy reasons, international projects should receive the same treatment as domestic projects and entity-wide actions. Certification in accordance with the current guidelines is sufficient under the statute. Independent third-party verification should continue to be optional, and not prescribe requirements for verifier independence and qualifications. Finally, DOE should strive to minimize transaction costs.

If DOE cannot substantially modify its proposal in accordance with our comments and recommendations, it should seriously consider abandoning it. While the current guidelines need improvement, they have been in effect for nearly 10 years and serve many of the multiple purposes identified in our comments.

From a process standpoint, we have two principal concerns. First, we urge that no key policy decisions be taken until after the conclusion of the final comment period on the Technical Guidelines and the re-proposed General Guidelines. We also recommend a 75-day comment period on the whole package of guidelines, consistent with the 74-day comment period on the initial General Guidelines. Second, the designation of the guidelines as a "proposed rule" and the addition of them to the Code of Federal Regulations appear to be inappropriate, unwise and inconsistent with the statute and legislative history.

INTRODUCTION

EEI notes the issuance by DOE, with the approval of the Secretary of Energy and in consultation with the Environmental Protection Agency (EPA) and other federal departments and agencies, of the December 5, 2003, document (68 *Fed. Reg*. 68204*)*, which is a proposed partial revision of the DOE Voluntary Greenhouse Gas Reporting program first established in 1994 pursuant to section 1605(b) of the Energy Policy Act of 1992 (EPAct), 42 U.S.C. § 13385(b). At the January 12, 2004, DOE workshop it was explained that while the proposal to revise the General Guidelines represents "the consensus view in the administration at this point, there are many key parts of them that we're not clear-cut about how we get there and what the right answer is."[1] It is our understanding that 1) the remainder of the proposed revisions will be in the form of Technical Guidelines and a simultaneous re-proposal of the General Guidelines by late spring or early summer and 2) the current voluntary guidelines remain in effect.

We commend the Secretary and the DOE for developing, pursuant to the President's directives of February 14, 2002, this important revision and for the DOE efforts, through the May 6, 2002, notice of inquiry (NOI) (67 *Fed. Reg*. 30370) and several workshops, to engage stakeholders and the general public in that development. We also appreciate the opportunity for EEI and others to present preliminary views on the proposed General Guidelines revision at the January 12, 2004, workshop and in writing today.

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[1] DOE, Public Workshop Materials and Transcript for Meeting, Section 6, p. 1 (Jan. 12, 2004) (hereinafter referred to as "Transcript").

EEI is the association of U.S. shareholder-owned electric companies, international affiliates and industry associations worldwide. Our U.S. members serve 90 percent of all customers served by the investor-owned segment of the industry. They generate more than 70 percent of all of the electricity generated by the electric utilities in the U.S. and serve nearly 70 percent of all ultimate customers of electricity in the nation. EEI is also one of seven electric power groups, known as the Electric Power Industry Climate Initiative (EPICI), formed to coordinate the power sector's response to President Bush's Global Climate Initiative and, through the President's Climate VISION Program, support his efforts to reduce the greenhouse gas (GHG) emissions intensity of the U.S. by 18 percent by the end of 2012. The other groups are: American Public Power Association, Electric Power Supply Association, Large Public Power Council, National Rural Electric Cooperative Association. Nuclear Energy Institute and Tennessee Valley Authority.

EEI and other EPICI members individually and collectively have been major voluntary reporters of GHG emission reductions to the database of the Energy Information Administration (EIA) under guidelines made final and available to the public by the DOE in October 19, 1994, by a *Federal Register* notice (59 *Fed. Reg*. 52769) issued pursuant to section 1605(b). For example, **in 2001 EEI and other EPICI members reduced, avoided or sequestered more than 275 million metric tons of carbon dioxide (CO_2)-equivalent ($MMTCO_2e$) GHGs out of total reported reductions of 352 $MMTCO_2e$, or 78 percent of all reported reductions under the current 1605(b) voluntary guidelines**. Accordingly, EEI, individually and collectively with EPICI, has a significant

interest in the substantive and procedural development of this proposal to revise the current 1605(b) guidelines. EEI has a number of significant procedural and substantive concerns with the proposal that are discussed below, despite the absence of the very relevant Technical Guidelines. The absence of the Technical Guidelines makes it very difficult at this juncture to recommend specific modifications to address those concerns.

I. A Number Of Significant Procedural Concerns Must Be Addressed.

A. No Key Policy Decisions Should Be Taken until after the Conclusion of the Final Comment Period on the Technical Guidelines and the Re-proposed General Guidelines.

EEI appreciates the *Federal Register* notice extending by two weeks (*i.e.*, to February 17, 2004) the deadline for public comment on the proposed revision, coupled with the statement that DOE "intends, subsequently, to publish for comment a supplemental notice of proposed revised General Guidelines, simultaneously with the publication for public comment of planned Technical Guidelines." 69 *Fed. Reg.* 4255 (Jan. 29, 2004).

Although the extension is brief, it is helpful and welcome, particularly in light of the commitment for further public comment on the revision of both the Technical Guidelines and General Guidelines. **We strongly urge that such further public comment period be for 75 days.** This would be consistent with the 74-day comment period on the initial General Guidelines.

As we indicated in our January 8, 2004, letter (which is part of the DOE docket for the December 5, 2003, proposed revision) requesting an extension of time for comments, the absence of the Technical Guidelines has potential "substantive implications for the electric utility sector." Unfortunately, our ability to understand the revised General Guidelines fully is hindered because there are many references to the Technical Guidelines that have yet to be developed and made public. Indeed, the proposed revision makes numerous references to the Technical Guidelines in both the preamble and the Part 300 revision of the General Guidelines. Three examples are:

- In section 300.5(b), "Reasons for changing the scope of entity reports," Technical Guidelines are required to "provide more specific guidance on how. . .changes should be reflected in entity reports and emission reduction calculations."
- In section 300.6(g), "Units for reporting," Technical Guidelines are called for regarding "standard conversion factors" for converting existing data "into the common units" required for "entity-level" reports, as well as for consumption of "purchased electricity," "purchased steam or chilled hot water" and purchased energy to be converted to CO_2 equivalents.
- In sections 300.8, "Calculating emissions reductions," and 300.9, "Reporting and recordkeeping requirements," several Technical Guidelines are also expected.

As a result, while our comments today are substantive and extensive, they are necessarily incomplete. We will use the opportunity for further elaboration, adjustment, revision and

modification of these comments when in the future DOE proposes the Technical Guidelines and General Guidelines together.

While we appreciate the desire to facilitate completion of the revision of the current guidelines, we are concerned about the DOE plans to make a "further revision" of the December 5, 2003, proposed revision for comment along with the Technical Guidelines. Presumably, the "further revision" will be based on the comments DOE received at the January 12, 2004, workshop, prior workshops, written comments and informal comments. Transcript, p. 107. We had misgivings about DOE making such revisions based on an incomplete public record, due to initial remarks at the January 12, 2004, workshop that unspecified

> key policy decisions. . .and modifications, if any of the general guidelines, are likely to occur in this round. And in the next round. . .we'll be looking for, how did what we issued in the technical guidelines change people's perception of the general guidelines to very strongly consider those comments.

Transcript, pp. 2-3. The official added, "In other words, we're not looking to reopen issues next spring that could have been resolved with the information that we have today. So take your best shot now on the general guidelines, would be my advice." *Id.* at 3. That suggested that DOE might have a closed mind about key policy decisions when the next comment period occurs, which would have unfairly shifted the burden to the public to change the DOE "perception" of what the General Guidelines should contain.

Based on the January 29, 2004, *Federal Register* notice, we understand that that is no longer the DOE or Administration view. We presume that all issues will be open for further revision, modification or even abandonment based on the second public comment period, which will cover the complete package of the section 1605(b) guidelines revision, namely, both the General and Technical Guidelines together.

B. The Designation of the Guidelines as a "Proposed Rule" and Their Addition to the Code of Federal Regulations Appear To Be Inappropriate, Unwise and Inconsistent with the Statute and Legislative History.

As published in the *Federal Register* on December 5, 2003, the proposed revision of the current guidelines under section 1605(b) of EPAct is designated as a "Proposed Rule." Moreover, in section I.B, "*Process for Finalizing and Implementing Guidelines*," the preamble states that DOE intends to publish a "notice of final rulemaking." In addition, in section IV.B, "*Review under the Regulatory Flexibility Act,*" the preamble asserts that "[a]lthough section 1605(b)(1) of EPAct mandates a public comment opportunity before Guidelines can be issued, the proposed guideline provisions are policy statements and procedural rules" and "not substantive regulatory requirements that would have an economic impact on small entities." Finally, in section IV.A, "*Review Under Executive Order 12866,*" the preamble states that "[t]oday's action has been determined to be a 'significant regulatory action' under Executive Order 12866," and "[a]ccordingly this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget."

There are similar references to this revision as a "rule," "rulemaking" or "regulatory action" in sections IV.D, "*Review Under the National Environmental Policy Act"* (NEPA); IV.H, "*Review Under the Unfunded Mandates Reform Act of 1995*"; and IV.I, "*Review Under the Treasury and General Government Appropriations Act, 1999*." The word "rule" also triggers in section IV.J a review under Executive Order No. 13211, which addresses "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use." According to section IV.J, Executive Order No. 13211 defines a "significant energy action"

> as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

68 *Fed. Reg.* 68215,

In addition to designating this revision as a "Proposed Rule," the DOE statement leading into the revised General Guidelines provides as follows:

> For the reasons set forth in the preamble, DOE proposes to amend Chapter II of Title 10 of the Code of Federal Regulations by adding a new Subchapter B consisting of part 300 to read as follows.
>
> **SUBCHAPTER B--CLIMATE CHANGE**
>
> **PART 300 — VOLUNTARY GREENHOUSE GAS REPORTING PROGRAM: GENERAL GUIDELINES**.

However, the "reasons" for DOE amending the C.F.R. are not readily apparent from our review of the preamble, unless, of course, DOE relies on the references to "rule," "regulations," etc. in the above-cited provisions of section IV.

EEI fully supports the DOE proposal to publish the voluntary General Guidelines as a *Federal Register* document pursuant to 1 C.F.R. §§ 5.3 and 5.9(d). We note that the current voluntary guidelines were not published as a *Federal Register* document when they were released in final form on October 19, 1994 (59 *Fed. Reg*. 52769). Rather, notice was provided that they would be "available for distribution on or before October 31, 1994" by "telephone request," by "facsimile request" or by "writing" to DOE. Indeed, such publication in the *Federal Register* is a far better approach, because it makes the voluntary guidelines more accessible to the public. It also affords them clear recognition as a federal document for many purposes, including applicability of 18 U.S.C. § 1001. **We urge that DOE adopt the same approach for the proposed Technical Guidelines and that the final version of the revised guidelines, General and Technical, be such a document.**

Nevertheless, in view of the statute and legislative history, there appears to be insufficient justification for a revision of the current voluntary guidelines (which were neither published as a rule nor placed in the C.F.R.) now being designated as a proposed procedural or substantive rule and then added as an amendment to the

C.F.R. in the form of regulations. In a letter of January 20, 2004, to the Director of the Office of Federal Regulations (which is in the DOE docket), we raised questions about the authority and appropriateness under 1 C.F.R., Parts 5 and 8 of this designation and amendment. We elaborate further about our reasons below.

First, the statutory authority cited in the December 5, 2003, proposal (namely, 42 U.S.C. § 7101 *et seq.* and 42 U.S.C. § 13385(b)) neither requires nor authorizes DOE to either 1) designate the revised voluntary guidelines as a "Proposed Rule" pursuant to 44 U.S.C. § 1505 and 1 C.F.R. § 5.9(c), or 2) codify them pursuant to 44 U.S.C. § 1510 and 1 C.F.R., Part 8. The first such authority is the DOE organic statute, the DOE Organization Act, which provides general authority to the DOE, subject to specific Acts of Congress administered by DOE. The second statute, which is specifically and directly relevant, is section 1605(b) of EPAct. Section 1605(b)(1) authorizes the revision of the guidelines, such as proposed on December 5, 2003. It also provides that the voluntary guidelines are to "establish procedures for the accurate voluntary reporting of information on" GHG emissions and emissions reductions.

Pursuant to section 1605(b), the current voluntary guidelines were noticed, not as a rule of any kind, but as nonbinding voluntary guidelines, when proposed in June 1994 (59 *Fed. Reg*. 28345). That document stated that the guidelines are:

> separate from the national aggregate inventory established and updated under section 1605(a) of EPAct. Because submission of data under 1605(b) is

> **voluntary**, this database cannot be designed for use as a comprehensive national ghg accounting system, and they may not serve to provide a statistically accurate representation of aggregate U.S. ghg emissions or their reductions.

(Emphasis in original.)

In addition, the notice said:

> The language of section 1605(b)(1)(C) provides that the guidelines are to address **reporting** reductions achieved as a result of plant closings, and Federal and state requirements, in addition to those which result from **voluntary** actions. Thus, the guidelines do not limit submissions based on either the motivation of the parties involved or on the reason for the activity.

(Emphasis in original.)

On October 19, 1994, the *Federal Reg*ister notice stated that the guidelines were "finalized" and available at DOE for "distribution on or before October 31, 1994" by persons asking for them by telephone or in writing (59 *Fed. Reg*. 52769). The guidelines, as noted above, were not designated in 1994 as a "Proposed Rule," and there was no reference to the Regulatory Flexibility Act. In fact, they were not even published as a *Federal Register* document. As to Executive Order No. 12866, the final version said that the document was "not a significant regulatory action" because it does "not meet the criteria which defines such action" under that order. There was no review under NEPA. While the other Executive Orders and statutes mentioned in the December 5, 2003, preamble to the proposed revision were not in existence in 1994, their existence today does not provide DOE with authority to designate this revision as a rule. It is our understanding that they are only triggered if the underlying statute authorizing the action provides for rulemaking and, as we have discussed, neither section 1605(b) of EPAct nor the DOE Organization Act does so.

Furthermore, by letter dated September 25, 2002, EPICI provided "Supplemental Comments" to DOE concerning its May 6, 2002, NOI. It included an "Enclosure" titled "Electric Power Industry Climate Initiative Comments on Legal Authority Questions" that, among other things, discussed the legislative history of section 1605(b). After discussing the process of the development of EPAct in the Senate and House of Representatives leading up to a conference between the two Houses and pointing out that the House version required rulemaking, EPICI said that the conferees "eliminated involvement of an interagency coordinating council and a mandate that a national security accounting system for voluntary reductions of greenhouse gases be established by rule." EPICI then said:

> As a substitute for the council, the conferees provided for consultation with EPA, "as appropriate." Instead of rulemaking and the specific registry, the conferees called for secretarially issued guidelines and a "data base" of "information voluntarily reported." That information would cover both emissions and reductions as well as projects.

In essence, the House-passed version, which called for rulemaking, was abandoned by the conferees in favor of voluntary guidelines and the creation of a section 1605(a) for EIA to develop a separate "national aggregate" inventory of GHG emissions and, of course, section 1605(b). Unless DOE has some different understanding of the legislative history than EPICI and EEI do, there appears to be no basis in section 1605(b) and the legislative history to designate this revision generally as a "Proposed Rule" or specifically as a "procedural rule." In short, the Congress neither required nor authorized rulemaking in adopting section 1605(b).

As we explained to the Office of the Federal Register, we are aware that 44 U.S.C. § 1505 and 1 C.F.R § 5.2(c) provide for publication in the *Federal Register* of documents that are determined to "have general applicability and legal effect" and that 44 U.S.C. § 1510 provides for the codification of such documents. However, 1 C.F.R § 1.1 provides that 1 C.F.R § 5.2(c) documents are those that prescribe a penalty or course of conduct; confer a right, privilege, authority or immunity; or impose an obligation. Clearly, the DOE proposed revision does not provide or prescribe a course of conduct or a penalty; confer a right, privilege or immunity; or impose an obligation. While the proposed revision might be construed as providing procedural "authority" for entities to submit voluntarily information to EIA and DOE, so do the current guidelines, which, as we have said, have never been designated or construed as a rule within the categories maintained in 1 C.F.R § 5.9(b), either by the Congress in enacting section 1605(b) of EPAct or by DOE. In fact, **we reiterate that the legislative history of the 1992 law shows that the House-Senate conferees did not intend that the guidelines – which are to "establish procedures for. . .voluntary reporting of information" (section 1605(b)(1)) – should be designated as a rule of any kind.**

As to the proposed codification, we have noted that the "Explanation" of title 10 of the C.F.R. provides that the C.F.R. "is a codification of general and permanent rules published in the Federal Register." Even if that explanation were not dispositive of the issue, there is no statutory basis for DOE to treat a revision of the current guidelines as a

"general or permanent rule" merely because it is published in the *Federal Register*. Accordingly, there appears to be no basis in either the 1992 statute or 1 C.F.R., Parts 5 and 8 for designating the DOE-proposed revision of the voluntary 1605(b) guidelines as a rule of any kind (*i.e.*, substantive or procedural). **Such a designation appears to be unauthorized and inappropriate. It is also unwise because it could be read as establishing the guidelines as rules or regulations with the force of law and enforceable in a court of law** (particularly in the absence of any statement in the preamble to the contrary and the lack of justification in the preamble for the rule designation)**. This, in turn, could invite litigation and embroil the government and reporting entities in disputes over the legal interpretation and enforceability of various provisions in the guidelines**.

In a very prompt January 23, 2004, response to our inquiry, Director of the Office of the Federal Register (OFR) Raymond A. Mosley said, "OFR did not specifically require the document to be issued" in codified form but that "we accept DOE's decision" to do so. He pointed out that OFR "reviews documents submitted for publication in the *Federal Register* to ensure that the documents conform to OFR publication requirements" and that the "OFR staff does not substantively review the documents, except to the extent of ensuring that all documents that must be codified are properly categorized and formatted for codification." Mr. Mosley went on to discuss statutes, regulations and policies as applied by OFR to this proposal:

> Upon review, we find that there is ample justification for issuing the document as a proposed rule/codified policy statement under the Federal Register Act and

implementing regulations, customary agency practice, and public policy consideration. In our view, codification of these guidelines, which are clearly identified as voluntary, furthers the statutory objective, ensures permanent public access, and creates no detriment to regulated entities.

Pursuant to 1 CFR 1.1 , the phrase "documents having general applicability and legal effect" includes documents conferring a right and/or privilege. Documents that confer a right and/or privilege fall within the scope of the "Proposed Rules" and "Rules and Regulations" categories of documents defined in 1 CFR 5.9. The OFR interprets "rights" and "privileges" as including benefits offered to private entities by the Government, including voluntary programs having general applicability to a class, such as the 1605(b) program. In the DOE document, the preamble also states an intention to use the 1605(b) program to document the greenhouse gas (GHG) emissions for other voluntary Federal programs, such as, "Climate VISION" and "Climate Leaders" and requests comments on this proposal. These voluntary programs offer a variety of benefits to participants, including, plant assessments, training, software tools and technical assistance with inventories. Because it may be possible to obtain a benefit from voluntary compliance with the 1605(b) program, it was not inappropriate to publish the document in the *Federal Register* as a proposed rule/amendment to the CFR.

Title 44 U.S.C. § 1510(a) provides that "rules of general applicability and legal effect" which "are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions..." are to be published in the *Code of Federal Regulations*. In this instance, 42 U.S.C. § 11385, states that the Secretary of DOE shall issue guidelines for the voluntary collection and reporting of GHG emissions. While these procedures are not legislative rules as defined by the Administrative Procedure Act (APA), the CFR is not limited to rules resulting from APA rulemaking. The procedural framework of the 1605(b) program establishes a broadly applicable voluntary regime that may be used to confer a benefit on parties who choose to follow the guidelines. Because the 1605(b) procedures are part of DOE's authorized activities and statutory functions, it is within the discretion of OFR and DOE to publish the document as a proposed rule/policy statement formatted for codification. Additionally, the Administrative Conference of the United States (ACUS) in Recommendation No. 76-2 recommended that policy statements and interpretations be published in the "Rules and Regulations" section of the *Federal Register* and "be preserved in the *Code of Federal Regulations* when they are of continuing interest to the public." The customary practice of the OFR is to enable agencies to implement ACUS Recommendation No. 76-2 as a matter of sound public policy. Please note that many other agencies have codified guidelines and interpretive material in the CFR (e.g., 29 CFR part 2509).

We appreciate Mr. Mosley's explanation that designating this revision as a "Proposed Rule" under the Federal Register Act and adding the revised guidelines to the C.F.R., pursuant to 44 U.S.C. § 1510(a), as a permanent rule was made by DOE and not OFR. He characterizes the revision as a "proposed rule/. . .policy statement under the Federal Register Act," not under any law administered by DOE. In addition, DOE has never referred to the proposal as both a rule and a policy statement. Moreover, the preamble does not provide any explanation for this DOE action. Possibly there is a significant purpose to be served or important benefit to be gained beyond those mentioned by Mr. Mosley. If so, it should be explained as part of the next revision when published for public comment so that the public can ascertain the DOE reasons and comment on them.

Further, OFR did not address our contention that the legislative history of section 1605(b) deliberately abandoned the rule approach. Nor has DOE indicated the legal basis for the proposed rule. OFR pointed to its statute without addressing the legislative history of section 1605(b) and concluded that DOE had "ample justification" to adopt the rule approach. **That arguably may be a position for OFR to take, but it is not an appropriate position for DOE to adopt**. As to the policy of publishing guidelines as a *Federal Register* document and even codifying them in the C.F.R., we certainly agree it is a better approach than the one adopted by DOE in 1994 for the current guidelines. However, that policy must conform to the enabling statute and its history, which does not support such publication as a rule. As to the OFR assertion that, in its "view," "no detriment to regulated entities" is created by such codification, that is irrelevant because

it has never even been suggested that volunteer entities under section 1605(b) are "regulated" by reason of volunteering. That should continue to be the case. In any event, there should not even be a remote suggestion of a detriment to volunteers.

We appreciate Mr. Mosley's comment that "these procedures are not legislative rules as defined by the Administrative Procedure Act (APA)" and that "the CFR is not limited to rules resulting from APA rulemaking." However, in order to be non-APA rules, the rules or procedures must be based on some statutory authority. As we have said, that authority is not found in the DOE Organization Act or section 1605 of EPAct.

Mr. Mosley states that other agencies have codified their guidelines and interpretative material in the C.F.R. He cites one example of that practice. However, the example shows that the codified material is a series of Labor Department "Interpretative Bulletins," none of which appears to be in the form of a rule. If, as Mr. Mosley indicates, such documents can be codified as non-rules, then of course we would not object to the revised DOE guidelines also being issued in the form of guidelines, not a rule, and codified in the C.F.R. as a "non-rule."

Thus, despite the OFR reply of January 23, our apprehension about the proposed rule continues unabated. In any event, we reiterate our support for the DOE publication of the revision as a *Federal Register* document or action pursuant to 1 C.F.R. §§ 5.3 and 5.9(d).

C. **EEI Incorporates by Reference Prior Comments by the Power Sector.**

In providing written comments on the December 5, 2003, revision of the current 1605(b) voluntary guidelines, we are concerned that the proposed revision does not appear to reflect, or be responsive to, written comments submitted on several occasions to DOE by the electric power sector through the EPICI in response to the May 6, 2002, DOE NOI. Those comments are:

- Letter of June 5, 2002, and enclosures from Robert Gehri and Robert Rainey to Jean E. Vernet, Esq., of the DOE Office of Policy and International Affairs.
- Letter of September 25, 2002, and enclosure from Messrs. Gehri and Rainey to Ms. Vernet.
- Letter of March 5, 2003, and enclosure from Mr. Gehri to Ms. Vernet.
- Letter of May 6, 2003, and enclosures from Lee Ann Kozak to Under Secretary Robert G. Card.
- In addition, prior to the NOI, EPICI submitted comments by letter of April 17, 2002, and enclosure from Messrs. Gehri and Rainey to Assistant Secretary Vicki A. Bailey.

EEI incorporates each of these by reference into these comments and intends by this reference that they be included in the DOE docket for the December 5, 2003, revision.

II. The DOE Proposal Is Inconsistent With Section 1605(b) And Presidential Policy And Fails To Serve And Reflect The Multiple Purposes Of The EIA Data Base.

A. The DOE Proposal Is Inconsistent with Section 1605(b) and Presidential Climate Policy Statements.

About 18 months after title XVI, "GLOBAL CLIMATE CHANGE," of EPAct was enacted, DOE proposed on June 1, 1994, for public comment a notice that DOE "is developing guidelines" for the "**voluntary** and accurate **reporting** of greenhouse gas emissions and reductions, and of sequestration" (emphasis in original). By way of background, the notice explained the differences between sections 1605(a) and (b) of EPAct, emphasized the voluntary nature of the reporting, and stated that the guidelines are to "assist those who wish to report," as follows:

> Under section 1605 of the EPAct, two databases related to greenhouse gases are to be established. These separately address (1) the inventory of aggregate national totals of greenhouse gas emissions, and (2) data voluntarily reported on emissions, reductions, and carbon sequestration.
>
> First, under subsection (a) the Secretary of Energy through EIA and without any expanded data collection authority is required to develop an inventory of national aggregate emissions of each greenhouse gas for each calendar year of the baseline period of 1987 through 1990. This inventory was published in September, 1993 ("Emissions of Greenhouse Gases in the United States, 1985-1990"; DOE/EIA-0573). This inventory will be updated annually, as required by the legislation.
>
> The voluntary reporting program database is required under subsection (b) of section 1605, and will consist of voluntarily reported information on annual greenhouse gas emissions and their aggregate inventory established and updated under subsection (a). Because submission of data to the program established under subsection (b) is voluntary, this database cannot be designed for use as a comprehensive national greenhouse gas accounting systems, and thus may not serve to provide a statistically accurate representation of aggregate U.S. greenhouse gas emissions or their reductions.

> The Secretary of Energy is required to issue guidelines with procedures for the accurate voluntary reporting of information on (1) greenhouse gas emissions on an annual basis for the baseline period 1987 through 1990, and for subsequent calendar years; (2) annual reductions of greenhouse gases and carbon fixation achieved through any measures; and (3) reductions in greenhouse gas emissions achieved voluntarily, or as a result of plant or facility closings, or as a result of State or Federal requirements.
>
> The guidelines and supporting materials assist those who wish to report in determining or developing information necessary to report.

59 *Fed. Reg.* 28345 (emphasis in original).

In making available the final version of the voluntary guidelines, DOE under the heading "Purpose of the Guidelines and Design Principles" emphasized encouragement of voluntary participation, saying:

> The final guidelines and supporting materials have been developed to reflect the goal of maximizing participation without compromising the usefulness of the data voluntarily submitted. Commenters on the draft guidelines generally supported the appropriateness of this goal, although some did not agree on how to strike a balance between maximizing participation and establishing a meaningful data **reporting** system. The flexibility provided by the draft guidelines, which takes into account the reporter's ability to use existing information and select appropriate quantification methods, was supported by many commenters as necessary to encourage participation.

59 *Fed. Reg.* 52769 (Oct. 19, 1994) (emphasis in original).

However, voluntary participation has not been overwhelming from many economic sectors in the nearly 10 years since that notice was issued. As noted earlier in these comments, the power sector has participated substantially in furtherance of the Climate Challenge program with DOE and would expect to continue to do so under a revision that also would encourage, not discourage, voluntary reporting. Unfortunately, broader

participation by all economic sectors has not been forthcoming, possibly because the current guidelines have never been published as a *Federal Register* document and because DOE may not have adequately publicized the importance of voluntary reporting. In addition, during much of this time, DOE and the prior Administration were focused on the development of the Kyoto Protocol, with its many mandates.

Whatever the reason for this limited participation, nonetheless the program has been a success. As noted in testimony before the Senate Committee on Energy and Natural Resources, the then EIA Administrator said:

> The Voluntary Reporting Program is unique among the many voluntary programs initiated during the early 1990's in its diversity of project types, participation, and approaches. The Voluntary Reporting Program's database provides a wealth of examples of types of concrete actions that organizations can undertake to reduce greenhouse gas emissions. Some of the most important benefits of the Voluntary Reporting Program:
>
> - The program has served to teach staff at many of the largest corporations in the United States how to estimate their greenhouse gas emissions, and educated them on a range of possible measures to limit their emissions. This is an important requirement for future action to reduce emissions;
> - The program has provided information for the evaluation of the activities reported to many of the government voluntary programs launched since 1993;
> - Reporters can learn about innovative emission reduction activities from the experiences of their peers. This potential has been illustrated for gases with very strong heat trapping capacities. The first reporting cycle included one project that reduced emissions of sulfur hexafluoride, which electric utilities use as an insulator for circuit breakers and switch gear. As more reporters realized that avoiding emissions of one pound of sulfur hexafluoride, with its heat trapping capacity 23,900 times as large as that of carbon dioxide, holds the same benefit as reducing 12 tons of carbon dioxide emissions, reporting on these projects has increased. By the 1998 data reporting cycle, ten utilities reported using more vigilant maintenance and leak prevention programs to eliminate 90 metric tons of sulfur

hexafluoride emissions between 1991 and 1998, equivalent to 2.2 million metric tons of carbon dioxide.

- The program has created a "test" database of approaches to emission reductions that can be used to evaluate future emissions limitation policy instruments; and
- The program has helped illuminate many of the important emissions accounting issues that must be addressed in designing any future approaches to emission limitations.

Testimony of EIA Administrator Jay Hakes (March 30, 2000).

Moreover, it is in the myriad economic interests of the U.S., DOE and the Administration to broaden, not contract, participation, in the 1605(b) program through this revision. In this regard, section 1605(b) has always provided that "guidelines establish procedures" for reporting that are both "voluntary" and "accurate" and for persons reporting to "certify the accuracy of the information reported" and use the information reported to "demonstrate," in various ways, "achieved reductions" of GHGs. That is no less a goal of the current guidelines than it is for any revision thereof. Furthermore, participation, as discussed below, and accuracy are compatible goals, and both should be emphasized with equal vigor in the context of any revision of the current guidelines. **As we stated at the January 12, 2004, DOE workshop, the challenge for DOE is to accommodate both greater quality and vigor in the data base and broader participation in reporting. These are not mutually exclusive goals, and it is a false choice to trade one off against the other.**

Indeed, EEI has always supported both greater accuracy and broader participation. During the 106th Congress we wrote to DOE urging that it begin the revision process, with the idea that both goals could be better achieved through such a revision. However, DOE at that time responded by saying that the Congress was considering amendments to title XVI of EPAct and wanted to wait on the outcome of that legislative effort.[2]

Thus, we were very encouraged by the launch of President Bush's Global Climate Initiative of February 14, 2002, during which he said that the "Administration will improve" the "current Federal GHG Reduction and Sequestration Registry that recognizes greenhouse gas reduction by non-governmental organizations, businesses, farmers, and the federal, state and local governments." He added:

> Registry participants and the public will have a high level of confidence in the reductions recognized by this Registry, through capture and sequestration projects, mitigation projects that increase energy efficiency and/or switch fuels, and process changes to reduce emissions of potent greenhouse gases, such as methane. An enhanced registry will promote the identification and expansion of innovative and effective ways to reduce greenhouse gases. The enhanced registry will encourage participation by removing the risk that these actions will be penalized — or inaction rewarded — by future climate policy.
>
> **Improve the Quality of the Current Program.** A Registry is a tool for companies to publicly record their progress in reducing emissions, providing public recognition of a company's accomplishments and a record of mitigation efforts for future policy design.

White House Global Climate Change Policy Book, p. 9.

[2] See letters of April 20, 2000, from Paul C. Bailey to Mark Mazur, and of June 13, 2000, from Mr. Mazur to Mr. Bailey.

Clearly, the President's calling attention to section 1605(b) and the guidelines served to raise both to a higher level of importance for EEI, our member companies and other sectors of the economy. **His equal emphasis on improvement of the quality of the guidelines and on calling the data base/registry a "tool" for "recognizing progress" and for "encouraging participation" were both welcome.**

However, section 300.1(a) of the proposed revision proposes dual purposes for the "Guidelines" that are not in harmony with the President's statements. One is that they are "to establish the procedures and requirements for filing voluntary reports" and the second is that they "encourage" entities to "submit annual reports of their net" GHG emissions, emissions reductions and sequestration activities that are "complete, reliable and consistent." No mention is made either of the statutory words "accurate" or "accuracy" or of the President's words "encouraging participation."

Moreover, in discussing the "basic objectives" of the proposed revision at the January 12, 2004, DOE workshop, a DOE official said that in reaching the "consensus view in the administration at this point" on the guidelines, "we seriously considered the comments we've received so far," which is good.[3] Transcript, p. 1. However, he added that apparently "as a result" of those comments

[3] Subsection (c) of section 1605 provides that "[i]n carrying out this section," which includes section 1605(b), the Secretary of Energy "shall consult, as appropriate," with the EPA Administrator. No other department or agency is mentioned. However, the President, in calling on February 14, 2002, for a revision of the guidelines, directed that DOE also consult with the Secretaries of Agriculture and Commerce. In noting the above

> when choosing between broader participation and the rigor and quality of the registry, we generally opted for quality. . . .
>
> [T]here's a firmer consensus on that issue than on many others. And so to the extent your comments are pushing us, in our opinion, backwards on transparency, quality, verifiability of the information, it'll be relatively more difficult for us to accede to those than others.

Id. Those remarks suggest that policy-makers prefer rigor and quality over broader participation. They seem to downplay participation, which is contrary to the views expressed by the DOE at its November 18-19, 2002, workshop. Then the DOE official said that "we need to balance vigor with practicality," adding that "[w]e don't want to be so striving for perfection that we lose sight of the fact that if this isn't practical and cost effective for our reporters, we're not likely to have very many reporters. So we want it practical, and at the same time rigorous." Transcript Day 1, p. 14. **We share that view and support the President's view of the importance of both objectives – improving the quality of the guidelines and encouraging participation. We strongly urge policy-makers to reexamine their position in light of the President's climate policy statements.**

EEI has always taken the 1605(b) guidelines and EIA data base/"registry" very seriously. However, as previously indicated and for the reasons discussed in section III below, **the proposed revision – especially the tiered reporting system with differing**

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comment at the January 12, 2004, DOE workshop that the proposed revision represents "the consensus view in the administration at this point," we also note that DOE has the sole statutory responsibility under section 1605(b) to develop, issue and administer the revised guidelines, and that a "consensus" among DOE and the consulting agencies is not required, although possibly desirable to the extent consistent with section 1605(b) and its legislative history.

consequences and the lack of incentives for, or recognition of, reports properly filed under the current guidelines – is inconsistent with the provisions of section 1605(b) and Presidential climate policy statements.

B. The DOE Proposal Fails to Serve and Reflect the Multiple Purposes of the EIA 1605(b) Data Base.

Second, **the DOE proposal fails to reflect the multiple purposes served by the "information" recorded in the EIA data ba**se. Section 1605(b)(4) makes it clear that such volunteered "information may be used by the reporting entity to demonstrate achieved reductions of greenhouse gases." Several of the multiple purposes served by such information were noted in the EIA Administrator's testimony set forth in section II.A above. In addition, as we indicated at the January 12, 2004, DOE workshop, those purposes include:

- Reports to DOE and EIA.
- Reports to the Federal Energy Regulatory Commission and other federal bodies.
- Information to shareholders and the Securities and Exchange Commission (*e.g.*, as attachments to 10 Ks and 10 Fs.
- Reports to state and regional commissions and bodies.
- Recordation of actions meriting transferable credit, baseline protection, credit for past actions or similar recognition.

- Recordation of companies' progress toward Climate VISION, Climate Leaders and other voluntary program goals.[4]
- Recordation of research, development and deployment contributions.
- Material for public relations purposes, media releases and annual reports.
- Demonstration that voluntary climate programs work.

See Transcript, pp. 19-20.

As Under Secretary Card acknowledged – and we agreed – at the January 12, 2004, workshop, the 1605(b) data base does not function as a national inventory. Transcript, p. 13. In fact, as noted by DOE in June 1994, the national inventory is a function of section 1605(a), not 1605(b).[5] Only one of 1605(b)'s many functions is to track the progress of individual or collective reporting entities in meeting their respective commitments to address the President's policy to reduce the greenhouse gas intensity of the country. Many other legitimate purposes abound. Indeed, these multiple purposes should be both served and reflected in the revised 1605(b) guidelines and the EIA data base.

With regard to the power sector's commitment to meeting the President's policy, progress by the power sector in achieving the 3-5 percent emissions intensity goal can be tracked in the aggregate, through EIA data bases and reports (such as the Electric Power

[4] See 68 *Fed. Reg.* 68213, col. 3.
[5] In addition, section 821 of Public Law No. 101-549 requires electric generators to monitor CO_2 emissions and report that data to EPA. Such emissions comprise about 99.99 percent of all of the power sector's GHGs.

Monthly), supplemented by voluntary reports by individual entities to the EIA section 1605(b) data base.

- The EIA national data base will be able to track changes in emissions intensity of generation adequately, but it will not allow the trends to be disaggregated and analyzed easily. In addition, the section 1605(b) data base will supplement the national data with information on company actions, including off-system and customer-enabled actions.
- Reports by individual entities to the EIA section 1605(b) data base will also allow for detailed tracking by type of action, ***assuming that information is reported on a project level.*** Entity-wide reporting will not add additional information relative to carbon intensity (unless entity-wide reporting were universal, which since 1605(b) is a voluntary reporting program will not be the case).

Thus, the degree to which the power sector's actions can be tracked through reports to the section 1605(b) data base depends upon the design of the guidelines and the degree to which participation in the data base is encouraged. The design of the guidelines will have a significant impact upon the degree of participation, the ability to monitor various types of voluntary actions, and ultimately, the level of achievement of the power sector goal.

III. A Unitary Reporting Data Base That Encompasses Both Entity-wide And Project-based Reports Is Preferable To A Tiered Reporting And "Registry" System.

A. A Tiered Reporting and "Registry" System Is Inconsistent with EPAct and Raises a Host of Problems.

EPICI called for a unitary federal reporting system for voluntary programs in a letter to Jean Vernet of DOE dated March 5, 2003.[6] In the enclosure to that letter and also in an EPICI paper filed with DOE on June 5, 2002,[7] **EPICI also explained why robust reporting is preferable to a tiered reporting system.**[8]

In contrast to current section 1605(b), the DOE proposed revision interprets the statutory provision – which has not undergone any amendment since 1992 – as authorizing the establishment of a tiered voluntary reporting system. In essence what DOE has proposed is:

- A tier of large and small entities whose reports conform to the "registration" standards set forth in sections 300.6 and 300.7 and are accepted by EIA under sections 300.12(a) and (b). The result is that their emissions reductions are "registered." See Figure 1 (68 *Fed. Reg.* 68207) and section 300.1(b)(1).
- A tier of entities who choose not to comply with the revised guidelines' requirements under sections 300.6 and 300.7 but who report their emissions or

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[6] As indicated earlier in these comments, this letter and its enclosure, "EPICI Positions on Key Policy Issues in Revising EPAct Section 1605(b) DOE Guidelines and EIA Registry," section 1, "The need for a unitary federal reporting system for voluntary programs," pp. 2-5, are incorporated by reference into these comments.

[7] "1605(b) Reporting Concept."

[8] See n.6, *supra*, at section 2, "Robust reporting vs. tiering," pp. 5-8.

> emission reductions anyway. Their reports can be accepted under section 300.12(a), but their reductions cannot be "registered." See preamble section II.A, 68 *Fed. Reg.* 68206 and section 300.1(b)(2).[9]

By way of explanation of this rather complicated, multi-tier proposal, preamble sections II.L and II.0.1 state:

> Registering only reductions that are achieved after 2002 would focus the program on those reductions most likely to contribute to the achievement of the President's goal for reducing U.S. emissions intensity by 18% between 2002 and 2012. In addition, because all of the data required to register reductions would be relatively recent, it would help ensure that all entities have an equal opportunity to register emission reductions under the new program. Nevertheless, the revised Guidelines would continue to permit entities to *report* emission reductions back to 1991, the earliest year permitted by the authorizing statute,[10] and reports that comply with the Guidelines would be made publicly available by EIA.

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[9] The DOE proposal raises two other potential "tiers": First, entities, including some covered by the primary tiers above, that would be encouraged to report emissions reductions achieved prior to 2003, including reports made under the current guidelines. (While there is some ambiguity in the proposal (see section 300.7(b)'s reference to emissions reductions that have occurred "since 2002," which presumably should say "after 2002"), it appears that 2002 is the proposed base year.) These reports also may be accepted under section 300.12(a) and, according to preamble section II.L (68 *Fed. Reg.* 68211), made publicly available by DOE, but may not be registered. See preamble section II.A (68 *Fed. Reg.* 68206) and § 300.1(d).

Second, entities where the "Administration intends to use the 1605(b) program to document, where possible, the progress of participants" in other voluntary programs, such as "EPA's Climate Leaders program." 68 *Fed. Reg.* 68213. DOE seeks "comment on the merits of using the 1605(b) program for documenting progress of participants" in "other specific voluntary Federal programs in order to provide distinct benefits to program participants." *Id.* However, there is neither any mention of such reporting in the C.F.R. language nor, among other things, an identification of what those "distinct benefits" would or could be and whether they would or could include "registration."

[10] This statement is incorrect. The earliest year permitted by the statute to report **emissions** is the baseline period of 1987-1990. However, the statute is silent on the earliest year to report **emissions reductions.** The preamble language concerning a base

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> It is the net effect of all of these actions on an entity's emissions that is the most important indicator of an entity's contribution to the President's goal of reducing U.S. emissions intensity. . .Small emitters, such as households, and some farms, forest operations, and small businesses, would be permitted to register the reductions achieved in just one area of activity, such as building operations or forestry, rather than accounting for all of their emissions, so long as they certify that these reductions are not a product of shifting emissions to non-reporting parts of the entity. In addition, the proposed Guidelines would continue to provide a mechanism for large emitters to report, but not register, the reductions resulting from individual actions or projects affecting a part of the entity's emissions, even if they could not demonstrate that they had achieved a net reduction in their total emissions, relative to their physical or economic output.

68 *Fed. Reg.* 68211 (emphasis in original.)

In addition to our earlier comments in this docket, we have several serious objections to this tiered approach.

1. <u>It is inappropriate for DOE to narrowly focus on large entities who can report net annual emissions reductions</u>.

First, while, EEI is a strong supporter of the President's goal for reducing U.S. greenhouse gas intensity by 18 percent between 2002 and 2012, the voluntary GHG reporting program mandated by Congress in the 1992 enactment of section 1605(b) of EPAct is far broader in its reporting objectives and requirements than the President's program and covers a span of years that both pre-date and post-date the President's program. Thus, while it is appropriate for DOE to encourage reporting that "would highlight the net contributions of reporting entities" as an "indicator of an entity's

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year no earlier than 1990 (or a base period no earlier than 1987-1990) is also incorrect insofar as it relates to emissions reductions. See 68 *Fed. Reg.* 68210.

contribution to the President's goal" (68 *Fed. Reg.* 68211), **it is inappropriate and inconsistent with the statute for DOE to fashion the voluntary guidelines revision so that only entities that, in essence, report net annual emissions in accordance with the President's goal can have their emissions reductions accepted and "registered" for some sort of unexplained "special recognition."** See also discussion on tiers in section III.A, footnote 9 above regarding EPA's Climate Leaders program and other voluntary federal programs.

2. It is inappropriate for DOE to transform the 1605(b) voluntary data base into a tiered reporting program with multiple classes.

Second**, it is also inappropriate and inconsistent with the statute for DOE to change the voluntary data base into a class-oriented reporting program that distinguishes among various entities – large-entity "registrants," large-entity reporters, small-entity "registrants," small-entity reporters, pre-2003 reporters, etc**. In the case of large and small entities,[11] DOE is artificially treating them as equals for "registration" purposes even though small entities do not report equally in conformance with the guidelines for large entities. In short, there is an unwarranted, less stringent set of requirements for small entities. (See discussion in section VI.B.5 below.) By giving both large and small classes of entities preferential treatment in the form of "registration" and so-called "special recognition" over other classes of entity volunteers, DOE also creates an unauthorized preference for those entities to the detriment of other volunteer persons

[11] For the electric power sector, the term "emitters" in Figure 1 would not be appropriate for several "legally distinct entities," such as a nuclear facility, wind generator, or energy service company engaging in demand-side management and energy efficiency activities.

and entities recognized in section 1605(b). There is no basis in the statute for giving some classes of reporting entities more favorable treatment over others.

In his January 23, 2004, letter to EEI, OFR Director Mosley (see discussion in I.B. above) explained that the guidelines can be designated a "rule" because they "confer. . . a right and/or privilege" and "interprets" those words "as including benefits offered to private entities by the Government, including voluntary programs having general applicability to a class, such as the 1605(b) program." Assuming Mr. Mosley's interpretation is supportable, the "benefits" presumably have to be available to the entire "class," not a portion thereof. In short, fashioning the guidelines so that only reductions of those persons or entities, large or small, of a class that falls under section 300.1(b)(1) of the revision may be "registered" or "recognized," and those of others may not, is inconsistent with the concept of "general applicability" and is discriminatory.

B. Project-based Activities Should Receive Equal Treatment with Entity-wide Actions in a Unitary Reporting Data Base.

At the January 12, 2004, DOE workshop, groups as disparate as EEI, World Resources Institute (WRI) and Competitive Enterprise Institute (CEI) all spoke in favor of a unitary reporting system. The problems with a tiered system are many. First, it would create separate categories of "first-class citizens" (*i.e.,* entities registering their reductions) and "second-class citizens" (*i.e.,* entities only able to report their reductions). The vast majority of reported tons of emission reductions would fall into the second category, while only a few gold-plated tons would be eligible for the first

category. Furthermore, the mere presence of the "registration" category would devalue the tons reported in the vast wasteland of the second category. The further consequences of the DOE tiered proposal are addressed in section V below.

Under the DOE proposal, tons that qualify for the "registry" are supposed to receive "special recognition." 68 *Fed. Reg.* 68206. Thus far DOE has not indicated what the nature of that special recognition is. DOE comments at its January 12, 2004, workshop would appear to indicate that recordation in the "registry" is the only special recognition currently contemplated. **Without further incentives – such as transferable credit, baseline protection and credit for past actions (discussed in section IV below) – the "registry" proposed by DOE would provide little or no value to justify the burdensome reporting hurdles that must be overcome to qualify tons for it.**

Not only are any possible advantages or details of the "registry" not spelled out, but the DOE proposal also only hints at possible functions. In the context of verification, the proposal refers to entities who "seek to sell their registered emission reductions" and "private markets." 68 *Fed. Reg.* 68210. However, nothing relating to emissions trading, markets or the like is even mentioned in the context of the "registry."

DOE should substantially modify its proposal so that project-based reductions, avoidances and sequestrations could also be "registered" or recognized within a unitary reporting data base, or at least receive equal treatment with entity-wide

actions as under the current guidelines. **Participants at the January 12, 2004, DOE workshop were virtually unanimous in their support of project-based reporting.**

The advantages of project-based reporting are many:

1. The statute specifically authorizes and focuses on the reporting of projects.

Section 1605(b)(1)'s emphasis is not on entity-wide reporting but rather on:

> voluntary reporting of information on. . .
> (B) annual reductions of greenhouse gas emissions and carbon fixation achieved through **any measures**, including fuel switching, forest management practices, tree planting, use of renewable energy, manufacture or use of vehicles with reduced greenhouse gas emissions, appliance efficiency, energy efficiency, methane recovery, cogeneration, chlorofluorocarbon capture and replacement, and power plant heat rate improvement[.]

(Emphasis added.) Thus, **the statute is concerned with projects, and sets forth a lengthy laundry list of projects by way of example**.

2. A project-based approach recognizes that a ton is a ton.

Under a project-based approach, a ton of GHGs reduced, avoided or sequestered is recognized (assuming that certain basic reporting criteria are met – see point III.B.5 below). A ton is a ton, so long as it is a real reduction, avoidance or sequestration. The atmosphere presumably is better off with the project activity being undertaken and reported since GHGs have been reduced, avoided or sequestered. Motivation and causation are irrelevant under the statute, as reductions achieved as a result of voluntary reductions, plant or facility closings, and state or federal requirements are all permissible, which was recognized by DOE in June 1994. 59 *Fed. Reg.* 28345 (1994); see discussion in section I.B above. **The DOE proposal's requirement that only net annual entity-**

wide reductions may be registered is both inconsistent with the statute and contrary to the project-based approach.

3. A project-based reporting approach is more consistent with company actions that focus on reducing greenhouse gases than an entity-wide reporting approach is.

When a company attempts to reduce its entity-wide GHGs – either absolutely or in intensity – on a net annual basis, it runs headlong into a number of complex considerations, many of which it has little or no control over. These factors include: the state of the economy; the financial health or business plans of the company; federal, state and local regulatory environments; the supply and price of coal, natural gas and other fuels; weather, which can dramatically affect hydroelectric capacity, water supply and other operational factors; the scheduling of nuclear plant outages; etc.

Given these complex financial and operating environments that act as real-world constraints, some companies may only be able to undertake specific projects to reduce, avoid or sequester GHGs rather than attempt to reduce their entity-wide emissions on a net annual basis. This is particularly true in the power sector, which is a growth sector of the economy and where electric demand in most years closely tracks the increase in Gross Domestic Product. It is particularly difficult for large multi-state utilities and multinational power companies to target the entire corporation to reduce GHGs on an entity-wide level on a net annual basis.

We strongly urge DOE to modify its proposal substantially to provide appropriate incentives for project-based activities, such as the "registration" or recognition of projects in accordance with workable reporting criteria (see point III.B.5 below). Such incentives will promote the kinds of actions that are truly targeted at global GHG reductions, avoidances and sequestration: project-based activities. In addition, such incentives will encourage more participation in voluntary programs and boost the numbers of reported tons – both laudable goals that DOE and the Administration should be interested in facilitating through its reporting system.

From a policy perspective, surely DOE must want to design a data base that encourages project-based activities. Indeed, it would be highly unfortunate – and inconsistent with the plain wording of the statute – if DOE designed a reporting system that failed to give such activities the same status as entity-wide reductions. As one participant at the January 12, 2004, DOE workshop stated, "Many of the entity issues exist. . .because there is a bias against project-based reporting." Transcript, p. 21. **We strongly urge DOE not to abandon 10 years of project-based reporting under the current guidelines, but rather find reasonable and effective ways to allow the continued recognition of such voluntary reporting.**

4. <u>GHG emissions trading market realities support project-based reporting.</u>

The realities of the marketplace governing GHG emissions trading support project-based reporting. Several participants in the January 12, 2004, DOE workshop – most notably WRI and the Southern Company – pointed out that what is sold, bought, traded,

exchanged or otherwise transferred today is tons of GHG emissions reduced, avoided or sequestered resulting from projects, not entity-wide reductions. Transcript, pp. 23-24, 32. This is true not only in the U.S. but also across the globe, as traders in different countries focus on project-based tons. There may be a few instances of a company's entire entity-wide emissions reductions being traded for a particular year, but these are exceptional cases that do not detract from the operational realities of today's GHG emissions trading market. **Hence the DOE proposal should be substantially modified to account for these operational and marketplace realities, by "registering" or recognizing project-based activities.**

5. Project-based activities can be appropriately "registered" or recognized within a unitary data base.

There is no question that project-based activities can be "registered" or recognized within a unitary reporting data base. **This can be accomplished by requiring reporting entities to 1) submit the Baseline Entity Statement (BES) proposed under section 300.5 and 2) fulfill the other reporting criteria proposed under section 300.8(b)(5)(as modified below)**. In other words, in addition to filing a BES, an entity wishing to "register" or report a project in the EIA data base would need to:

a) Use output, utilization and other data that are consistent, to the maximum extent practicable, with the project's actual performance in the year for which reductions, avoidances or sequestrations are being reported.

b) Exclude any emission reductions that were caused by actions likely to be associated with increases in emissions elsewhere within the entity's operations[12] – in other words, protect against leakage.

c) Uses methods that are in compliance with DOE Technical Guidelines.

In summary, this approach would correct the DOE proposal's inequitable treatment of entity-wide and project-based reporting, would properly reflect marketplace realities governing GHG emissions trading, would help to provide proper incentives to project-based activities, would recognize that a ton is a ton, and would be consistent with the statute. Numerical examples of how properly to construct a unitary data base with both entity-wide and projected-based reporting are contained in the EPICI May 6, 2003, letter to Under Secretary Card, pp. 4-6.

IV. The DOE Proposal Lacks Real Incentives And Meaningful Recognition And Thus Is Inconsistent With The President's Policy As Well As The Four-Agency Letter.

A. The Proposal Utterly Fails to Respond to the President's Call and Four-Agency Letter's Recommendations for Transferable Credit and Baseline Protection.

Under the heading "Enhanced National Registry for Voluntary Emissions Reductions," the February 14, 2002, White House Global Climate Change Policy Book stated that the "enhanced registry will encourage participation [by volunteer reporters] by removing the

[12] We have eliminated the criterion in proposed section 300.8(b)(ii) calling for the exclusion of any emission reductions "that might have resulted from reduced output" because it is inconsistent with section 1605(b)(1)(C) of EPAct.

risk that these actions will be penalized — or inaction rewarded — by future climate policy." The policy statement expanded on this overall theme, saying (p. 9):

> The President directed the Secretary of Energy to recommend reforms to ensure that businesses and individuals that register reductions are not penalized under a future climate policy, and to give transferable credits to companies that can show real emissions reductions. These protections will encourage businesses and individuals to pursue innovative strategies to reduce or sequester greenhouse gas emissions, without the risk that future climate policy will disadvantage them.

The May 6, 2002, NOI took particular note that "the President directed the Secretary of Energy to recommend reforms 'to ensure that businesses and individuals that register reductions are not penalized under a future climate policy, and to give transferable credits to companies that can show real emissions reductions.'" The NOI expressly requested comments on these "identified" matters. EPICI responded in a June 5, 2002, letter with enclosures, which, as noted above, is incorporated by reference in these comments.

In their July 8, 2002, letter reporting to the President on actions to carry out his directive, the Secretaries of Energy, Commerce and Agriculture and the then head of the EPA (the four-Agency letter) provided a list of "recommended improvements" to the current guidelines that they had "identified." The list included provisions to "[d]evelop fair, objective, and practical methods for . . . awarding transferable credits for actions that lead to real reductions" and for "credits for actions to remove carbon dioxide from the atmosphere as well as for actions to reduce emissions." The letter explained that "developing such methods is central to achieving the objective of measurement accuracy, reliability, and verifiability, as specified in the February 14, 2002, announcement" and

that "[p]roviding incentives and recognition for actions to reduce the concentrations of greenhouse gases in the atmosphere will facilitate their adoption."

In addition, in his opening remarks at the November 18-19, 2002, DOE workshop, White House Council on Environmental Quality (CEQ) Chairman James Connaughton emphasized both presidential directives:

> Now, why are we here? What are we trying to achieve? Our measurement of success is very straight forward. It's to help us realize the President's charge in February of this year to enhance the current federal greenhouse gas – greenhouse gas reduction and sequestration registry and to come up with a process for reporting transferable credits related to real reductions in greenhouse gas emissions. This registry is going to recognize greenhouse gas reductions in all sectors: by non-governmental organizations, businesses, farmers, and the federal, state and local governments. So this is a comprehensive effort, as comprehensive as we can make it.
>
> * * * *
>
> And then finally, as a result of that, then we want to protect and provide transferable credits related to those real emission reductions. As you know, the President directed the Secretary of Energy to recommend forms that would enable this kind of participation by businesses and individuals, by removing the risk that the action they take today, or their inaction will not be rewarded in the future by future climate policies. So we really want to at least to get – create a building block of recognition that at least, from this administration's perspective, will be acknowledged and recognized with respect to any future climate policy which can involve a variety of – could involve a variety of potential measures.

Transcript Day 1, pp. 3-4.

Naturally, in light of the President's directives and statements, the four-Agency letter and CEQ Chairman Connaughton's statements, EEI and the entire electric sector expected that when the revised guidelines were actually proposed for comment, they would include

some reasonable form of recognition of transferable credits and provisions for baseline protection in the context of the EIA data base. Indeed, our expectations were further bolstered by the September 9, 2002, letter to the President from the chairmen of the President's Cabinet-level Committee of Climate Change Science and Technology, Secretaries Abraham and Evans, who, in discussing the "Voluntary Emissions Reductions Program," reported:

> The primary goal of these improvements is to create a comprehensive and transparent program to report and credit real greenhouse gas reductions.
>
> The proposed improvements also include developing fair, objective, and practical methods for reporting baselines, calculating real results, and awarding transferable credits for actions that lead to real greenhouse gas reductions. Developing such methods is central to achieving the objective of "measurement accuracy, reliability, and verifiability," as specified in your February 14, 2002, direction to the four of us.

In responding in June 2002 to the DOE NOI, we were aware that the White House Global Climate Change Policy Book also made note of a "number" of legislative proposals to "reform the existing registry" – which we understood to mean the existing EIA data base established under the statute – or to "create a new registry." The NOI said that the "Administration will fully explore the extent to which the existing authority under the Energy Policy Act is adequate to achieve" the presidentially directed "reforms." In requesting comments, the NOI further expressed an "interest in receiving written comments from persons with particular knowledge of the institutional, legal and technical issues related to measuring and reporting GHG emissions, emissions reductions, and carbon sequestration."

While there was no indication in either the July or September 2002 letters to the President by the agency heads about what the "legal" issues were, EPICI took the opportunity on September 25, 2002, to submit "Supplemental Comments" to the DOE docket. The EPICI cover letter thereof noted the NOI reference to "policy, technical, and legal questions" and pointed out that "[u]nlike the policy and technical questions, the NOI did not raise any specific legal authority issues." However, EPICI observed that "some" respondents to the NOI "did raise questions about legal authority" and thus EPICI believed it necessary and appropriate to address those questions, including a rather exhaustive review and discussion of the legislative history of section 1605 of EPAct. The cover letter concluded that "EPICI is not aware of any legal authority inadequacies for achieving the presidential directives. EPICI is also unaware of any 'significant. . .legal [authority] questions' posed by the President's directives." The EPICI letter and enclosure are, as noted above, incorporated by reference.

Subsequently, we became aware of further comments to the docket, particularly by a Competitive Enterprise Institute (CEI) representative, that examined the EPICI September 2002 response to the legal authority inquiry. In a letter dated March 5, 2003, to the DOE docket, EPICI once again discussed in some detail the wisdom and importance of the President's directives on transferable credits and baseline protection, restated its support for both, and in an enclosure responded fully to the CEI

representative's comments on legal authority. The DOE authority under EPAct and the DOE Organization Act – both of which are cited by DOE in the December 5, 2003, proposal as authority for the proposed revised General Guidelines – is far from lacking. Like other EPICI letters to the docket, that letter is also incorporated in these comments by reference.

Now, more than a year after the Abraham-Evans letter to the President endorsing his transferable credits and baseline protection concepts and about a year after the CEQ Chairman's comments at the first DOE workshop in strong support of those directives, DOE has issued a proposal for revising the current 1605(b) guidelines for voluntary reporting that makes no reference to these two presidential directives, either by way of including implementing provisions or by way of an explanation for their absence. In essence, the directives appear to have been silently abandoned.

When an inquiry was made of the officials chairing the January 12, 2004, DOE workshop about this apparent abandonment, the response was that the DOE Office of General Counsel, in consultation with other federal agencies, has "determined" that DOE does not have "explicit authority." Transcript, p. 76. Of course, EPICI never premised its case on such explicit authority. Rather, based on the legislative history of section 1605(b), EPICI had concluded that DOE could provide a form of nonbinding recognition of credits and

provisions for baseline protection, especially when there is no statutory statement to the contrary.

However, the DOE officials did not explain when and how the determination about lack of authority (explicit or otherwise) was made, except to state, "Certainly, the discussion of it evolved over a series of months and interagency discussions at the policy level." Transcript, p. 77. Evolving "interagency discussions" of such an important presidential directive at a "policy level" do not appear to be a legal determination by anyone that DOE lacks authority. Surely, the high visibility given to both issues by the President would lead one to conclude that if there were a lack of authority – which we dispute – there would be a written, publicly available record to support that conclusion. As one participant at the January 12, 2004, DOE workshop said, "[I]t's surprising that it wasn't mentioned anywhere in the 'Federal Register' notice." Transcript, p. 85.

Also relevant to the authority issue is the January 23, 2004, letter from the Office of the Federal Register (discussed in section I.B above), which states that there is "ample justification for issuing" the guidelines "as a proposed rule/codified policy statement," that their "codification. . .furthers the statutory objective" and that the "procedural framework of the 1605(b) program establishes a broadly applicable voluntary regime that may be used to confer a **benefit** on parties who choose to follow the guidelines" (emphasis added). Clearly, two of the benefits anticipated by the President in issuing his directives in February 2002 are to provide for transferable credits and baseline protection.

If those benefits are not adopted in the revised guidelines, we cannot identify the "benefit on parties" that Mr. Mosley referred to.

We continue to urge that the proposal be further revised to implement the President's directives in the most creative way. If DOE, its Office of General Counsel and other agencies do not believe that this can be accomplished, DOE should publicly provide the policy reasons and legal basis underlying its conclusions.

The fact is that transferable credit and baseline protection are not incompatible with the President's climate policy agenda, representing important policy incentives that would help promote participation and reporting in the President's voluntary programs while providing a nonbinding hedge against current and future climate regulatory policy. In particular, baseline protection is as important – if not more important – an incentive to participation in voluntary programs and reporting in the revised 1605(b) program as transferable credit.

B. **An Explanation of the Nature of "Special Recognition" for the EIA "Registry"/Data Base Is Conspicuously Absent.**

Under the heading "Voluntary Reporting and You," the current 1605(b) voluntary guidelines state that the program

> provides an opportunity for you to gain **recognition** for the good effects of your actions – **recognition** from your customers, your shareholders, public officials, and the Federal government. Reporting the results of your actions adds to the groundswell of efforts to deal with the threat of climate change.

See Appendix to proposed Part 300 revision, 68 *Fed. Reg.* 68220 (emphasis added). According to the most recent EIA report, Voluntary Reporting of Greenhouse Gases 2002, Table ES1, p. ix (Jan. 2004), this "recognition" has resulted in the number of reporting entities growing from 108 in 1994 to 207 in 1998 and 1999, peaking at 236 reporters in 2000, dropping to 232 reporters in 2001 and 228 reporters in 2002, and in the number of projects reported growing steadily from 634 in 1994 to 2,089 in 2000, dropping to 1,897 in 2001 and increasing again to 2,027 in 2002. EIA said that the "number of projects reported has grown at a more rapid rate than the number of reporters, because the number of projects reported by repeat reporters has increased" (p. x). **In 2000, the electric power sector "accounted for 1,287 (68 percent) of the projects reported." EIA, Voluntary Reporting of Greenhouse Gases 2000, p. 3 (Feb. 2002). As indicated in the Introduction to these comments, that percentage rose to 76 percent in 2001**. This reporting is significant, and further participation in voluntary programs and reporting should be encouraged through the use of the incentives discussed in sections IV.A and C of these comments and through real recognition by DOE of the reduction achievements.

The preamble to the DOE proposal states that "the revised Guidelines will provide a means for entities that are able to meet additional requirements to register emission reductions achieved after 2002. This **registry** will provide **special recognition** to such emission reductions." 68 *Fed. Reg.* 68206 (emphasis added). Obviously, DOE believes

that a "registry" is integral to this "special recognition" because at the January 12, 2004, workshop a DOE official said:

> The . . . special recognition is precisely the registration, that we think by registering the reductions, by going through the data requirements that are needed to register, that that provides recognition that the reporting entity has supplied the entity-wide information on the inventory that we're seeking and has done the assessment of the entity-wide reductions, perhaps using intensity or the absolute or with the method that is most appropriate.
>
> We think that in and of itself is recognition, the registered reduction is the recognition for going the extra data mile.
>
> And so. . .that's what we're offering, and we think that's extremely valuable to a lot of companies for the same reasons, the current 1605(b) is extremely valuable, that it provides a vehicle to report on positive things that are undertaken. It's a way to establish a record, now a more credible or hopefully a more standardized record. And we hope that it will be – there will be growing consistency with what we're doing, with what other states are doing. So we think that in and of itself is recognition.

Transcript, p. 79. We share the DOE view that to be able to "register" emissions reductions, avoidances and sequestration with EIA under the statute could be a valuable form of recognition in, for example, the context of some future climate policy. We also observe once again the President called for that recognition when he directed DOE and other agencies to develop the reporting reforms of transferable credits and baseline protection.

However, there is a basic flaw in the DOE response. **Our review of the proposed Part 300 General Guidelines does not reveal 1) any mention of a "register" or "registry" or any provision for its establishment by DOE or EIA, 2) any details or explanation**

of the term "special recognition," or 3) what makes the "recognition" any more "special" than the type of recognition discussed above for the current guidelines.

Since there is no mention in the proposed Part 300 revision of the "registry," we can only presume that DOE and EIA plan to somehow use the existing EIA data base as if it were a "registry" and perhaps even as a "national registry" of some – but not all[13] – "reported reductions," including (as discussed in section III.A footnote 9 above) reports of other voluntary federal programs. However, there is neither a formal designation in Part 300 of the section 1605(b) data base as a register nor any indication of its purposes or value. In fact, instead of providing for establishment of a registry, section 300.12(c) expressly states that EIA "will establish a publicly accessible database composed of all reports" that meet the criteria for acceptance under section 300.12(a).

Thus, the only apparent difference between the EIA data base of the current guidelines and the "registry" of the proposed revision is whether reporting entities choose and are able to comply with the "registration standards" of sections 300.6 and 300.7 of the proposed new Part 300. If entities choose to comply and can meet the complex, inflexible and onerous new restrictions proposed by DOE, the preamble states that reductions will continue to be "registered" someplace. Section 300.12(c) indicates that a

[13] Recall the discussion in section II.B above pointing out that Under Secretary Card acknowledged – and EEI agreed – that the data base is not a national inventory. The national inventory function is served by section 1605(a) of EPAct.

"portion" of the data base will be for "registered" reductions, without saying whether that is merely a physical segregation or something more.

If entities decline to comply, there will be no "registration" of their reductions in the EIA data base, which could result in less participation in reporting and voluntary programs than occurred in 2000, 2001 and 2002 – a result that would be inconsistent with the stated objectives of the President. Under section 300.12(c), such reports can be accepted, but they cannot be "registered." Indeed, it is unclear what happens to these reports once they are accepted. Section 300.12 is incomplete at best and is quite confusing.

If DOE intends the EIA data base of the current guidelines to be the vehicle for providing "special recognition" for emission reductions, it must explain how that recognition is, in fact, "special" and different from that afforded by the current guidelines. As far as we can determine, the only difference is the issue of compliance with sections 300.6 and 300.7. That difference does not appear to be "special."

Moreover, DOE must explain how the "information" reported to the data base that is afforded so-called "special recognition" will be segregated from all other "information" voluntarily reported to the data base under section 300.12(c) and will be managed by EIA. Clearly, the proposed revision lacks any such explanation.

At its January 12, 2004, workshop, a DOE official explained that the Administration "intends to use the 1605(b) reporting program as the central reporting program for reporting on greenhouse gas emissions and reductions for those folks that are also in voluntary action programs like Climate VISION or Climate Leaders." Transcript, p. 100. As discussed in section IV.A above, the Federal Register Director in his letter of January 23, 2004, referred to this as one of the "benefits" of the program. The DOE official added at the workshop:

> It is the statutory program of the federal government, and we're trying to create the program to be accommodating the kinds of MOUs that are underway within DOE, with EPA, and other voluntary programs as they. . .ensue.
>
> We recognize that 1605(b) may not be the best vehicle to report on all of the actions that companies and trade associations are agreeing to undertake within their MOU, and we fully recognize that there may be other kinds of reporting mechanisms or showcasing opportunities to talk about the type of actions that companies undertake, be they pilot projects or R & D. There's a wide range of commitments within the Climate Vision and Climate Leaders MOUs.
>
> We want to use 1605(b), however, to be the point of recordation for emissions inventories and emissions reductions. There's been some comment about this throughout the last year in their written comment period about how these programs are linked, and we'd like to hear your comments on our proposal or our statement that's in the draft guidelines as well as in the preamble. Again, 1605(b) is the reporting program, recognizing that there may be additional types of information that you would need to supply to either the DOE or the Environmental Protection Agency regarding any agreements that you have with them about meeting certain goals.

Transcript, p. 100.

While EEI sees some merit in this proposal, it is important to ensure that the revised guidelines are drafted to fit the statutory design and purposes of the section 1605(b) program and data base. To the extent there is an attempt to bring other, non-DOE

programs into the data base, any accommodation that needs to take place should be on the part of the non-DOE programs and agencies, not the section 1605(b) program.

It is important to emphasize that the section 1605(b) data base is the national federal repository of voluntary GHG emissions and emissions reductions reporting information. As companies consider additional voluntary GHG reduction initiatives and partnerships, they will be more likely to participate if they know that there will be a single EIA-run repository for information and one set of guidelines to follow.

C. The Proposal Fails to Provide Credit for Past Action or Similar Recognition.

When the White House initiated this effort to revise the voluntary guidelines, it quite properly took note that in 1999, 207 companies and other organizations reported on more than 1,700 projects "that achieved 226 million metric tons of carbon dioxide equivalent reductions – equal to 3.4 percent of national emissions" to the global atmosphere. The July 8, 2002, four-Agency letter to the President recommended that DOE "[d]evelop a process for evaluating the extent to which past reductions may qualify for credits." In its March 5, 2003, letter to the docket, EPICI welcomed the President's recognition of industry's reporting under section 1605(b) and the current guidelines, as well as the recommendation of the four agencies.

1. The proposal fails to provide credit for past action.

However, the proposed revision conveys a rather different message, namely, that all of the efforts to date by reporting entities cannot receive credit or even be "registered" or recognized. This is clearly stated in the preamble in sections II.J and A:

> To focus the program on current and future efforts to reduce greenhouse gas emissions, entities would be permitted to register only those emission reductions calculated using a base year no earlier than 2002 (or base period of up to four sequential years ending no earlier than 2002). However, entities may still report emission inventories and reductions for previous years, as long as any prior year emission reductions are calculated using a base year no earlier than 1990 (or a base period no earlier than 1987-1990). To be accepted as entity-wide reports under revised the Guidelines, emission reductions already reported to the 1605(b) registry must be recast to fully comply with the revised Guidelines.
>
> * * * *
>
> The proposed revised Guidelines would enable and encourage entities to report (but not register) emission reductions achieved prior to 2003.

68 *Fed. Reg.* 68210, 68206.

EEI does not understand the legal basis for DOE interpreting section 1605(b) as permitting it to choose an arbitrary year of 2002 and declaring that only reductions reported after that year may be included in the EIA data base and "registered," while reductions properly reported under the current and legally effective guidelines and the statute between 1994 and 2002 may not be so included and "registered," even if "recast to fully comply with the revised Guidelines." There has been no change in the statute and, as discussed above, there apparently is no change in the EIA data base. **We strongly urge DOE to explain the legal basis for this distinction.**

2. The proposal is unclear about the status of past actions reported under the current guidelines.

In addition to our concerns about legal authority, we are confused by section 300.9(a)(1), which provides that entities may "report emissions and sequestration on an annual basis." However, to "be **recognized** under these revised Guidelines, all reports must conform to the measurement methods established by the" yet to be developed and published for public comment "Technical Guidelines" (emphasis added).[14] Section 300.9(a)(1) adds, "This requirement applies to entities that report. . .for the first time as well as those entities that have previously submitted emissions reports" under section 1605(b).[15] However, the provisions of the preamble discussed in section IV.C.1 above appear to have a different connotation. Overall, it would seem that the provisions of the proposed section 300.9(a)(1) should be controlling. **We request a clarification, taking into consideration our comments on legal authority.**

Adding to the confusion is section 300.1(d), which provides that "EIA will continue to maintain in its. . .database all reports received" under the current guidelines, which are "included as Appendix A" to the proposed Part 300 as a "convenience of the readers." However, preamble section I.B explains that with respect to the current guidelines, "DOE intends to publish a **Federal Register** notice of termination on the same day that DOE

[14] Note that "Acceptance" of a report under section 300.12(a), which is discussed below, requires more than just conformance with "the measurement methods."

[15] While the first sentence of section 300.9(a)(1) omits the word "reductions" after "emissions" and the last sentence does not mention either "emissions reductions" or "sequestrations," we assume that these are mere oversights that will be corrected. If our assumptions are incorrect, DOE should explain these omissions.

publishes the notice of final rulemaking setting forth the revised guidelines." 68 *Fed. Reg.* 68205. That leaves in question the status of the Appendix A current guidelines as they apply to reports submitted before the 2002 arbitrary cut-off year. See preamble section II.A (68 *Fed. Reg.* 68206) and section 300.1(d). In addition, it is unclear what "convenience of the readers" means. One issue is whether the Appendix will be retained when the revision is finalized. **Rather than terminate the current guidelines, DOE should – consistent with section 300.1(d) – continue them in Appendix A with a provision that makes it clear that they apply only to prior reports.**

V. A Tiered Reporting And "Registry" System With No Incentives Could Jeopardize The Success Of Voluntary Programs.

In section III.A above we questioned the legality of a tiered reporting and registry system. Moreover, such a system, coupled with no incentives, would diminish participation in both voluntary reporting and voluntary programs. This is especially true for the power sector in the case of smaller utilities and financially distressed companies. **Several EEI member companies have indicated that they would not report under the revised guidelines.** Moreover, an examination of the section 1605(b) reports in the 2001 EIA data base shows the following:

Total Reporters

Project-based reductions only: 130.4 MMTCO2e
Entity-wide reductions only: 11.8 MMTCO2e
Both: Project-based reductions, 185.3 MMTCO2e and entity-wide reductions, 193.3 mmtCO2e

Power Sector Reporters

Project-based reductions only: 93.3 MMTCO2e
Entity-wide reductions only: 2.3 MMTCO2e
Both: Project-based reductions, 157.2 MMTCO2e and entity-wide reductions, 163.8 MMTCO2e

Thus, it is clear that the DOE proposal runs the risk of losing the many reporters – and associated tons – who report only on a project basis. It is also evident that projects are extremely important to those companies that choose to report on an entity-wide basis.

Once companies stop reporting, the power sector and the Administration would lose the ability to track what voluntary programs – if any – they are still undertaking. Moreover, disincentives to voluntary reporting would ultimately reduce participation in voluntary programs themselves, a terrible outcome that all of those interested in section 1605(b) and voluntary programs (and, along with the Administration, opposed to mandatory regulatory proposals) should be loathe to let happen.

Furthermore, under the DOE proposal, critics of voluntary programs would draw immediate and invidious comparisons between the two categories. They would point to the few tons in the registry category as evidence that voluntary programs cannot work and that the President's voluntary approach had failed. **Ironically, DOE has proposed a reporting system that at best serves the interests of a few companies undertaking voluntary actions, while ignoring entire industries and sectors and the thousands of companies that are participating in DOE's own Climate VISION program.**

Thus, by designing and implementing its proposed tiered system, DOE would be jeopardizing the success of Climate VISION voluntary programs and the President's climate policy. The stage would then be set in the near future for mandatory regulatory legislation or treaties.

VI. The Entity-wide Reporting Rules Are Unduly Prescriptive And Unworkable For The Electric Power Sector.

As we have explained, DOE should abandon its current proposal in favor of a unitary reporting system that allows project-based reporting and "registration" as well as entity-wide reporting and "registration." If DOE insists on moving forward with its current proposal, we recommend the following modifications.

A. The Metrics for Reporting Entity-wide Emissions Reductions Are Skewed and Need Modification.

1. The bias against entity-wide emissions reporting based on absolute tons should be corrected.

The proposed guidelines regarding entity-wide reporting are unnecessarily inflexible and stringent, and will likely deter companies from seeking both to report and "register" or receive recognition for their emissions reductions.

Sections 300.8(b)(1) and (2) allow entity-wide reporting either on an intensity basis (*i.e.*, the ratio of greenhouse gas emissions to output) or on the basis of absolute reductions, provided that certain conditions are met in each case. We support the addition in the proposed guidelines of entity-wide intensity-based reporting as appropriate in light of the

President's focus on intensity reductions. However, that focus is currently for a 10-year period, or until 2012. As we noted in section III.A.1 above, reporting under section 1605(b) both pre-dates and post-dates that focus, and thus the revised guidelines should not be designed solely to serve that focus, particularly when it comes to the so-called "benefits" of reporting expected by DOE, namely, recognition through "registration."

Moreover, we are concerned with the proposed policy under which entity-wide intensity-based reporting is strongly encouraged (see section 300.8(b)), while entity-wide emissions reporting based on absolute tons is discouraged except where companies cannot develop a meaningful output indicator to measure intensity. 68 *Fed. Reg.* 68212. Such a policy discriminates against entity-wide emissions reporting based on absolute tons by effectively requiring reporting entities to use an intensity-based metric in the calculation of GHG emissions reductions that are to be "registered."

Entity-wide emissions reporting based on absolute tons and "registration" (*i.e.*, absolute reductions of tons on a net annual basis) are as important as entity-wide intensity-based reporting, and should be allowed when companies wish to report and "register" tons in this manner. Obviously, an entity may have years in which its absolute emissions go down but its carbon intensity does not. For example, suppose a power generator chooses a baseline year of 2002 for calculating its carbon intensity per MWH. Additional pollution control equipment, required under the Clean Air Act regulations, is added in future years to the entity's electric generating units, causing the

entity's CO_2 emissions rate per MWH to increase because of the added equipment's parasitic electric usage. The power generator also initiates projects that reduce its absolute CO_2 emissions on an entity-wide basis; these projects also reduce the generator's carbon intensity but not below the base year level. Our understanding of the DOE proposal is that the power generator would not be able to report or "register" the CO_2 emissions reductions because its emissions rate would not be lower than its base year emissions rate per MWH.

According to the preamble, such actions to reduce GHG emissions could not be "registered" and the entity could not receive any credit or recognition for reducing its GHG emissions under either principal tier of reporting. Section II.O, 68 *Fed. Reg.* 68211. The preamble explains that the "net contribution" approach "reflects the Administration's interest in fostering broad efforts by corporations, institutions and other entities to reduce their total emissions." *Id.* However, from a global standpoint or even a U.S. perspective, a ton reduced is a ton reduced, though not necessarily a net reduction. Moreover, section 1605(b)(4) does not require net reductions or a net contribution approach, only "achieved reductions of greenhouse gases."

2. <u>The bias against, or exclusion of, certain types of emissions reductions activities should be eliminated</u>.

The proposed guidelines also discriminate against certain types of emissions reductions activities by excluding their consideration in determining reductions in absolute emissions, and appear to prejudge why certain actions would be taken by an entity. Such subjective judgments have no place in a voluntary reporting program, particularly one

designed to encourage voluntary actions. An entity should be allowed to report and "register" emissions below its baseline, regardless of the nature of the action leading to the reduced emissions.

The focus of the revised guidelines should be to encourage as many emission reductions activities as possible. After all, if total GHG emissions over time into the atmosphere are treated as the budget, any reduction of GHG emissions into the atmosphere – regardless of the nature of the action that caused the reduction – is a benefit to the environment (assuming that leakage is properly taken into account). The reductions represent GHG emissions that were not emitted to the atmosphere and will never be emitted. **It is critical that the proposed guidelines be revised to accommodate increased flexibility in the manner of reporting and the actions included therein.**

a) *Plant or facility closings, and state or federal requirements*

Sections 300.8(b)(2) and (d)(1) would preclude entities from considering plant closures or other reductions in output in determining reductions in absolute emissions, even though these actions may be part of an overall GHG mitigation strategy or even though they may be temporary due to economic, emergency, weather or other causes beyond the entity's control. These requirements would appear to apply to reporting under section 300.1(b)(2) as well as "registration" under section 300.1(b)(1), because the former provides that to report the entity must comply with "the requirements of this part other than §§ 300.6 and 300.7." However, **section 1605(b)(1)(C) expressly permits the reporting of reductions due to plant or facility closings, whether permanent or**

temporary, as well as those due to state or federal requirements and voluntary actions. Both section 300.8 provisions violate the statutory provision, which undoubtedly applies to reporting and which logically applies to "registration" as well.

Moreover, DOE expects entities to reported increased emissions due to the addition of new plants or facilities or other actions. It is unfair and inequitable for DOE to impose a different standard for plant or facility closings and for actions resulting from state or federal requirements, particularly in light of the statute.

Furthermore, the requirements in section 300.8(b)(2) that an entity must demonstrate that reductions were not achieved as a result of "reductions in U.S. output, or major shifts in the types of products or services produced" and in section 300.8(d)(1) that an entity must explain how reductions "did not result in a decline in the U.S. output" are vague and subjective. They are also overly prescriptive and resource-intensive exercises, particularly in light of the provisions in section 300.12(a) on acceptance of reports. **These types of resource-intensive, data-gathering efforts are disincentives to reporting and ultimately to participation in voluntary programs**.

b) *Acquisitions, divestitures or changes in products*

Section 300.8(b)(1) would preclude entities from considering "acquisitions, divestitures or changes in products" by requiring companies registering intensity reductions to demonstrate that such actions "have not contributed significantly to changes in emissions

intensity," even though they may represent legitimate strategies for reducing emissions intensity. **They should not be excluded from reduction determinations. In the same vein, we emphasize the importance of allowing companies with divergent lines of business to adopt multiple output metrics that correspond to operational differences across business units or even plants.**

3. The "offsets reductions rule" would create barriers to "registration" or recognition of entity-wide emissions reductions and disincentives to participation in voluntary programs.

The requirement that an entity submit emissions and emissions reductions reports annually in order to continue to receive "registration" or recognition for its reductions, coupled with the "offsets reductions rule," would create both an artificially high barrier for "registering" reductions and a disincentive for participation in voluntary programs. Not only could the result of the proposed requirement mean that any annual increases in net entity-wide emissions be offset with future net entity-wide reductions before additional net reductions can be "registered," but it could also call into question the long-term value of any emission reductions "registered" under these guidelines, since the recognition for such "registered" reductions could theoretically be revoked or negated at some point in the future by an increase in net entity-wide emissions.

Moreover, the entity-wide "offsets reductions rule" could have the undesirable effect of not allowing an entity taking actions to receive "registered" reductions in a particular reporting year because the entity's decreases in intensity are being used to offset overall increases from previous years.

Furthermore, the proposed requirement may fail to recognize that a variety of circumstances beyond the control of generators will affect the path of their overall emission intensity over time, including general economic conditions; the financial and business circumstance of the entity; fuel prices; and fluctuations in weather, hydro capacity and nuclear unit availability. Since most generators have a legal duty or obligation to serve, they do not have the option to choose how much electricity that they produce. While actions could be taken by an entity that could lower its emissions intensity path over time, the actions may not be sufficient to overcome normal business cycles and vagaries in weather and operational factors in order to produce an emissions intensity path below the baseline level each and every year.

The preamble discusses reducing "the quantity of emission reductions eligible for registration in future years if a reporting entity experiences a net increase in output-adjusted emissions after beginning to report." 68 *Fed. Reg.* 68211. However, the "offsets reduction rule" embodied in this preamble language and section 300.7(d) may be ameliorated in part by other preamble language that states, "This approach would preserve the recognition given to all previously registered emission reductions, even if an entity experienced net emission increases in the future or stopped reporting." 68 *Fed. Reg.* 68211. Unfortunately, the C.F.R. language is silent concerning the "accrued" reductions from previous years. **If DOE insists, contrary to our previous comments, on going forward with its unduly restrictive and punitive "offsets reduction rule,"**

we specifically request that it correct the omission in the C.F.R. language by incorporating the above-cited language from the preamble, *i.e.*, preserve the recognition given to all previously "registered" or recognized emissions reductions, even if an entity experiences net emissions increases in subsequent years or stops reporting.

Another problem is created by section 300.7(c). Addressing "Net emission reductions achieved by third parties (offsets)," this section provides that such reductions "may be included" in the net annual entity-wide assessment of emissions reductions required by section 300.7(a)(1) for large entities for "registration" purposes "as long as" "[a]ll of the reporting entities or other parties involved **certify to DOE** that they have agreed that the reporting entity should be recognized as the entity responsible for the reduction." Section 300.7(c)(2) (emphasis added). For the electric power sector, energy efficiency, demand-side management (DSM) and renewables programs are key components to the industry's achieving its Climate VISION Power Partners[SM] goal. Hence this requirement is an absolute deterrent to their participation in helping to reach that goal. It is one of the reasons why EEI has been concerned since December 5, 2003, about the details of the proposed Climate VISION memorandum of understanding insofar as they include reference to, and dependence on, the section 1605(b) revised guidelines.

This provision would create an insurmountable and unnecessary burden on electric utilities engaged in energy-efficiency, DSM and renewables programs with their

customers. While the terms "reporting entities" and "other parties" are undefined, we assume that in this context they mean residential, commercial, industrial, agriculture and other types of third-party persons or entities that virtually all EEI members have multiple ongoing and future arrangements with. In most cases, asking such third parties, particularly those in the residential and small business sectors, to "certify" to DOE (presumably subject to 18 U.S.C. § 1001) that the reporting utility entity is "responsible for the reduction" is simply unreasonable. The educational, communications and paperwork efforts involved would be too resource intensive, would not outweigh the burdens and would yield insufficient results.

Indeed, we cannot imagine that customers would willingly wish to sign some sort of government certification form, assuming it is approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, transmit it in a timely manner to DOE – with a copy to the utility so that it knows whether the third party signed the form – and do so on an annual (or even one-time) basis. We fear that such parties would view it as a government intrusion. Further, we cannot imagine that DOE/EIA would want to be the collector and administrator of such forms from potentially all parts of the U.S. In addition, we cannot imagine any electric utility volunteer wanting to solicit such certifications from parties on an annual basis in lieu of DOE and then keeping track of the paperwork to ensure that parties did, in fact, certify. This is simply not a practical scheme. **Surely, there must be a better alternative that would not be so burdensome and yet achieves the intent of this requirement reasonably**. For example, see current

EIA forms regarding "Multiple Reporting" (see Instructions for EIA-1605 form, March 2003, p. 17)

4. Additional technical guidance is needed to calculate reductions and intensity.

We strongly support the DOE efforts to allow the use of alternative methodologies for determining emissions reductions. This is a good example of the type of flexibility that enhances both the quality of the data and reductions, while broadening the opportunities for participation. However, because the description provided in the proposed guidelines is still quite general, we cannot comment further on the specific methods at this time. In addition, the proposed guidelines do not include any technical details about how intensity is to be calculated, other than to state, "For power generators supplying electricity to the grid, the preferred measure of output is clear: kilowatt hours." 68 *Fed. Reg.* 68211-12.

We would appreciate the opportunity to work with DOE to flesh out the details of the methods in an appropriate way, particularly as they relate to the electricity sector. **We encourage DOE to provide clear, practical guidance on each of the methods in the Technical Guidelines to be proposed later this year.**

B. **The Rules Governing Entity-wide Emissions Inventories Are Unduly Rigid and Onerous.**

1. Further flexibility is needed.

a. *Defining reporting entities*

The revised guidelines need to preserve the ability of an entity, regardless of the amount of its emissions, to report emissions reductions activities under section 1605(b). Even if an entity does not achieve a net reduction in its entity-wide emissions, it is important to capture project or activity-related reductions, the latter of which generally occur at the sub-entity level, because those actions have reduced the amount of anthropogenic GHG emissions entering the atmosphere. **If the proposed guidelines do not allow project or activity-related reporting, entities will be discouraged from reporting, and reductions in emissions will go unrecognized. This would be counter to the original purpose of section 1605(b).**

The proposed guidelines require that "entities" be "legally distinct businesses, institutions, organizations or households," although they also note that "a legally-distinct company, plant or activity [could] define itself as an entity, even if it is partially- or wholly owned by another company." 68 *Fed. Reg.* 68208. Thus, the distinctiveness of an entity is determined by whether it has a separate legal identity. In addition, the guidelines encourage but do not require reporters to define entities at the highest meaningful level of aggregation. *Id.*

Although these provisions provide some flexibility, reporters should have additional flexibility in defining "entity." A less onerous approach would be to allow a unit of a company to report as a separate entity where it has a distinct line of business and is operated independently. Under this approach, the determining factor would not be the legal status of the entity (which may depend on corporate formalities or other extraneous factors) but its operational independence. See discussion at January 12, 2004, DOE workshop by Southern Company and General Electric representatives. Transcript, pp. 16-17.

In addition, an entity should have the option of reporting emissions based on equity (percentage ownership of the emitting facility), production (percentage of facility's output received), or control basis (a reporting entity would have to have both an ownership position and be responsible for the operation of the emitting facility). Large corporations may prefer the flexibility of conducting separate inventories and making separate reduction determinations for different segments of their businesses.

Operational control may make sense for some utilities as the basis for reporting, but as the industry becomes more disaggregated, equity or financial share reporting may make more sense. Since the revised guidelines may be in effect for 10 or more years, the key watchword is flexibility. The important element is that the method used for each segment remain consistent from year to year, with an explanation for any changes. In this regard,

DOE can fulfill and improve upon the statutory standard of accuracy while still providing flexibility to reporters.

The guidelines note that DOE is also considering "more prescriptive approaches to the definition of entities, such as a requirement that the entity definitions correspond to those used for federal tax purposes." **We strongly urge DOE not to pursue this more prescriptive approach.**

b. *Defining operational boundaries*

The proposed guidelines appear to allow a reporting entity to be defined in such a way as to allow flexibility in the determination of what will be included within the boundary of the reporting entity. Section 300.4(a) provides that the "entity must determine, document, and maintain its operational boundary for accounting and reporting purposes." It then adds that the "entities are given some flexibility to set their operational boundaries in a manner that best suits their circumstances." Subparagraphs (1) and (2) of this section both use the non-mandatory word "should" in stating that the boundaries should be consistent with the entity's "legal, managerial and financial structure" and should "result in accurate and comprehensive reports of its greenhouse gas emissions and sequestration." Section 300.4(b) provides that "[i]n general" the boundaries "should" be selected so as to "encompass all emissions and sequestration associated with facilities and vehicles that are wholly owned and operated" by that entity. This section neither expressly nor otherwise refers to U.S. boundaries and emissions and sequestration.

Preamble section II.C makes it clear that these provisions apply whether the entity chooses to report or "register." 68 *Fed. Reg.* 68208.

However, the preamble also appears to undercut the flexibility afforded by the words "should," "[t]o the extent feasible," and "[i]n general" in sections 300.4(a) and (b) when it states:

> [R]eporting entities would have to provide an "entity statement" that meaningfully defines the operations and facilities (such as office buildings and vehicle fleets) covered by their entity-wide reports, and the greenhouse gas sources and sinks encompassed by these operations and facilities. Such operations would include those wholly owned and operated by the entity, and might include those operations that are partially-owned, leased or operated by the entity. Entities would be required to coordinate with other entities that shared ownership of particular operations to ensure that no double counting occurred.

68 *Fed. Reg.* 68208. Here, as in other portions of the DOE proposal, where the preamble and the C.F.R. language are in actual or apparent conflict or are inconsistent or ambiguous, the C.F.R. language would and should prevail. **Nevertheless, such conflicts, ambiguities and inconsistencies should be eliminated.**

Moreover, as discussed later in this section, **entities should have the option of reporting boundaries that exclude office buildings, vehicle fleets and other sources that are likely to have minimal emissions, particularly since section 1605(b) was not intended by the Congress to be an inventory section. This should be without regard to the application of the *de minimis* standard. Similarly, entities should have the option to include only those GHGs that they emit regularly in significantly measurable amounts. Such discretion should also apply to sequestration activities.**

In short, flexibility is needed, and flexibility should be encouraged and emphasized both in the preamble as well as the C.F.R. language.

2. The burdensome *de minimis* rules should be eased.

The proposed guidelines set a *de minimis* limit for reporting emissions at 3 percent of an entity's total emissions inventory or 10,000 tons of CO_2e, which ever is smaller. This limit is relevant to the establishment of boundaries and to emissions inventories. It also serves as an artificial line of demarcation between "large" and "small" entities.

The proposed *de minimis* exclusion provides no real relief for reporters. It is yet another disincentive to participation, in addition to the requirements to report **all** sources for **all** GHGs as well as **all** terrestrial sinks, which are discussed in sections VI.B.3 and C.1 below. This threshold level would penalize many companies that might want to undertake reduction projects and "register" them through the section 1605(b) guidelines without incurring the expense and effort of an entity-wide inventory.

For the electric power sector, GHGs from generation will be virtually all of their entity-wide emissions. For many large electricity generators, the 10,000 tons *de minimis* threshold is less than one-tenth of 1 percent of the entity's emissions. Thus, under the current proposed inventory provisions for registration, generators would need to inventory more than 99.9 percent of their emissions – virtually all of their emissions – even though non-generation emissions and sinks are insignificant yet very time-

consuming and costly to inventory. This would be an enormous, counterproductive burden that would likely discourage large entities from participating in a voluntary 1605(b) reporting program due to the costs, resources and time needed for entities to complete their annual emissions inventories.

At the January 12, 2004, DOE workshop, representatives of DuPont, General Electric, Twenty-First Strategies, American Electric Power and Southern Company provided numerous examples of the problems created by onerous emissions inventory requirements:

> [DuPont]
> [T]o get the 3 percent, you've got to estimate all those things in some formality. . .like employee commute emissions, which we don't think we should have to do. Within our site . . . we have crane cars and things. We have welding machines. Some are gas-powered, some are electric-powered. Those get to be a pain in the neck.
>
> * * * *
>
> [General Electric]
> [T]he de minimis issue gets to be very important to us. Right now, the guidelines says 10,000 tons or 3 percent cutoff, whichever is. . .less. If I remember correctly, 10,000 tons for us is 0.01 percent of what our total inventory would be. No matter how hard I work, no matter what I inventory, no matter what I do, I'll never be able to go to a corporate officer and allow him to sign a certification that says that he has met that definition of de minimis.
>
> * * * *
>
> We've got 650 facilities worldwide in our inventory. We've got somewhere around 2- to 3000 – we actually assume 5000 facilities in our de minimis. I don't think we're quite that high. I don't think anybody in GE actually knows how many facilities we have, any one person.
>
> But that was the approach we took. Perhaps could we get to 3 percent? Yes, we probably could get to 3 percent on a total entity-wide basis. We probably

> could get there. Anything under that is going to be extremely difficult just because of the enormous number of operations, how expensive it would be to collect all the information and so forth.
>
> * * * *
>
> [Twenty-First Strategies]
> Just to follow on that point with an example for the electric power sector, a single unit of 800 megawatts coal-fired will put out in excess of a few million tons of CO_2 a year, and the 10,000 ton cutoff, if you're dealing with the smaller of those two, is a small fraction of 1 percent. So almost every electric power generator would be constrained to something well in excess of 99 percent.
>
> * * * *
>
> [American Electric Power]
> You're going to hear the same comment in that for Bob at GE it was 0.1 percent. For AEP, it's 0.005 percent, the 10,000 tons of our emissions. So. . . really, it makes no sense for us to put together the effort to try to track down to that level. What we'd like to see is the greater of 10,000 tons and 5 percent.
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> * * * *
>
> [Southern Company]
> For us, 10,000 tons is something less than 0.001 percent, which basically means we've got to go out there and capture every last ton, which isn't going to happen. From our perspective, the preferred approach would be something qualitative. As was suggested over there, the idea of focusing on significant and insignificant activities would be the preferred approach.

Transcript, pp. 48-49.

Several alternatives to the DOE proposal were offered at the workshop. For example, the DuPont representative suggested that DOE borrow from Title V of the Clean Air Act and use the term "insignificant activities." *Id.* at 47-48. The American Electric Power representative suggested "greater of 10,000 tons and 5 percent," while Twenty-First Centuries suggested a 3 percent cutoff. *Id.* at 49. A representative of ESP said, "[T]he

level of uncertainty is probably in excess of 3 percent anyway just due to the uncertainties of emission factors and activities. So 10,000 tons is, for many companies, within the noise." *Id.* at 50. The Southern Company representative "preferred" a "qualitative" approach, noting that "going to something that's a greater than and a higher percentage would be better than what's there now," but "it still gives you the problem that you've got to go and quantify all that stuff the first time to be able to" report. *Id.* at 49-50.

In summary, while there was not a consensus alternative at the workshop, participants were unanimous in characterizing the tons and percentage combination in the DOE proposal as unworkable. The basic problem stems from section 300.6(a), which states:

> The objective of the entity-wide reporting standard is to provide a comprehensive inventory of an entity's total net greenhouse gas emissions, including all six greenhouse gases listed in paragraph (f) of this section and all emissions and sequestration associated with changes in terrestrial carbon stock. The reporting entity should report all of the covered greenhouse gas emissions from within the entity, using the methods specified in the Technical Guidelines (to be issued subsequently).

Such reports are a "prerequisite for the registration of emission reductions" for large entities under section 300.6(b)(1).

While the words "objective" and "should" suggest some flexibility and *de minimis* section 300.6(e) calls the reporting a "goal," it appears that this flexibility is dependent entirely on the *de minimis* standard for emissions and sequestrations that DOE wants to

impose on all large entities and also use as the means for distinguishing between large and small entities. This approach disregards DOE statements in 1994 and the differing provisions of section 1605 regarding GHG emissions and inventories. As previously noted, section 1605(a), not (b), addresses an emission inventory. Section 1605(b) is addresses voluntary reporting of emissions reductions. Issues of "registry" and "special recognition" are also relevant.

One possible solution is to retain the words "objective" and "should," drop the reference to a *de minimis* standard with respect to emissions and sequestrations for large entities, and apply a tonnage/percentage standard as a test for small entities as part of a definition of such reporters. The large entities would report on how they are meeting that objective or goal, but they would not be held to a fixed and arbitrary tonnage or percentage standard. This would be in the nature of a qualitative standard. Another possibility is to raise the percentage and modify the qualifying words to "whichever is greater." Yet another option is to raise the percentage and eliminate the greater than/lesser than approach. Whatever alternative is proposed in the next revision, consideration should be given to whether it is intended or should apply to the setting of entity boundaries and what the purpose is in achieving accurate reporting of information under the statute.

3. Reporting of all six greenhouse gases should not be required.

The proposed guidelines would require companies conducting inventories to include all six GHGs. This requirement could place unnecessary burdens on companies who emit

certain gases in *de minimis* quantities but would need to expend considerable effort to inventory these emissions. **Companies should be allowed to exclude one or more gases from reporting if these gases are clearly identified and each is emitted in insignificant amounts.**

4. Trade associations are legitimate reporting entities.

Another issue raised in the proposed guidelines is whether trade associations should be able to consolidate entity reports into a single aggregated report. **We support allowing this approach.** For industries with sector-wide programs for meeting the Administration's intensity reduction goal, submission of a consolidated report could be a useful vehicle to demonstrate progress and enable all companies in the sector to gain the benefits of "registering" or recognizing reductions. However, issues relating to confidentiality and competition, selection of the appropriate official for certification of the report, and incentives and recognition (such as transferable credit, baseline protection and credit for past actions) may need to be addressed.

Under such an approach, trade associations and third-party aggregators should be allowed to report on a project basis and should not be required to submit the same data that a corporate entity is required to report. In addition, trade associations, like individuals, should be allowed to "register" emissions reductions, even though it is more likely that trade association members will want to "register" their own reductions rather than allow their associations to do so for them. In order to avoid double counting, trade associations

could be allowed to report in the aggregate but "registrations" would be reported by their members.

Sector-wide reports would not obscure the performance of individual companies and thereby reduce transparency. Individual companies would still be able to report and "register" or recognize their actions, but aggregated reporting would also allow for the incorporation of industry-wide initiatives and reflect sector-wide progress in reducing intensity, in line with the President's goal and the goal of the particular sector's Climate VISION program.

5. The bias in allowing small entities to "register" without meeting the same requirements as large entities should be eliminated.

Based on an arbitrary *de minimis* tonnage and percentage dividing line, section 300.6 allows numerous entities – including businesses, government entities, educational institutions, other nonprofit organizations and households – not to be required to report their total emissions inventory. Yet these entities are to be treated equally for purposes of "registration" and related recognition, even though they may be only a single ton or a few tons below that line. This approach creates an advantage or bias in favor of small entities, even though reductions "registered" by such entities would likely be relatively small in comparison to the reductions likely to be "registered" by entities above the threshold (large entities).

Further, such an advantage or bias would seem to conflict with the intent of the guidelines to facilitate participation in reporting and encourage voluntary actions by all

entities. Similarly, **in the case of the electric power sector the reporting and "registration" provisions fail to take into account the structural differences that have occurred as a result of various governmental and other actions *(e.g.*, deregulation, unbundled companies, and integrated and independent generators). Such biases should be corrected in favor of a unitary reporting system.**

C. **Other Entity-wide Reporting Problems Should Be Rectified.**

1. DOE should not require reporting of carbon storage or sinks.

The preamble (68 *Fed Reg.* 68208) and section 300.5(a)(5) appear to require companies to include carbon storage (or sinks) in their emissions inventories. Unless companies are managing their land holdings with the explicit aim of storing GHG emissions, tracking yearly fluctuations in carbon storage as a result of land sales, purchases or development activities would be cumbersome, costly and resource-intensive and would be unlikely to contribute to the accuracy of the company's inventory or the section 1605(b) voluntary emissions reductions reporting program. **Therefore, the revised guidelines should not require reporting of carbon storage or sinks.**

2. DOE should not require reporting of mobile source emissions.

Section 300.6(b)(1) requires inventories to include emissions from mobile as well as stationary sources within the organizational boundaries. (See also discussion of definition of source in section VIII.C below.) The scope of this requirement is uncertain but could cover company-owned fleets (vehicular, barge and airline). **Companies**

should have the option to either include or exclude them in their inventories, as long as the mobile sources excluded do not reflect the companies' primary business activity.

VII. The Treatment Of Direct Emissions And Direct Emissions Reductions, Purchased Power Emissions, And Avoided Emissions Needs Modification.

A. Reporting Should Focus on Direct Emissions and Direct Emissions Reductions.

In addressing the subject of direct versus indirect emissions reporting, the preamble notes that large entities must account for indirect emissions associated with purchased power in order for the entity to "register" or receive recognitions for, not just report, its emissions reductions. See Figure 1 (68 *Fed Reg.* 68207). The terms "direct emissions" and "indirect emissions" are defined terms. However, they appear to have different meanings as used in section 300.6.

Section 300.6(c) addresses indirect emissions inventories associated with the purchase of electricity. It is aimed at providing a "clear incentive" to electricity users and users of other forms of purchased energy to reduce demand. Subject to the Technical Guidelines, reporting entities have the option under section 300.6(c)(2) to choose to report other forms of indirect emissions, but these emissions cannot be "registered" or recognized, just reported. The reports of such "other forms" of indirect emission "must be clearly distinguished from reports of indirect emissions associated with purchased energy."

In addition, the preamble states:

> As there are substantial opportunities to reduce the emissions associated with both the generation and use of electricity, it is important that the program cover both electric generators and consumers. In doing so, however, it is also important to ensure: (1) that electricity-related emissions and emission reductions are not double counted; (2) that the conversion factors used to translate kilowatt hours into emissions are accurate indicators of the actual emissions associated with the generation of electricity; and (3) that recognition for reductions is given to those entities primarily responsible for those reductions.

68 *Fed. Reg.* 68212. The preamble adds that the revised guidelines and the yet unreleased Technical Guidelines "will attempt to achieve these objectives," which leaves us wondering what additional revisions are contemplated and makes it difficult to comment now.

In an effort to avoid double counting, the preamble states that the proposed guidelines would require users to distinguish between "indirect" emissions related to their electricity consumption and the direct emissions that they produce on their own (from manufacturing and industrial processes to their actual products). DOE promises in the yet unreleased Technical Guidelines to "specify the factors to be used to convert purchased electricity use to greenhouse gas emissions." *Id.* In the meantime, DOE has decided that a likely factor will be based on the average emissions per kilowatt-hour for electricity that has been consumed in a region. For the purpose of calculating emissions reductions associated with reduced electric demand, DOE may specify an alternative factor, such as one based on the emissions associated with regional electric supplies at the margin, largely excluding electricity generated by hydro, nuclear plants and some coal, which tend to be fully utilized regardless of changes in regional demand for power. The factors could change from year to year, and they "could be required to be used by all

consumers of purchased" power, subject to demonstrated "special circumstances" that DOE has yet to specify. In addition, DOE has yet to specify or determine how the emissions credits (direct or indirect) will be divided between producer and customer, but will attempt to do so in the Technical Guidelines. Clearly, the details of the Technical Guidelines will be extremely important in these areas.

Under the section 300.2 definition of "direct emissions," the GHG emission is from either a stationary or mobile source that is owned or controlled by an entity. Direct emissions result directly from fuel combustion or other processes that release GHGs on site. According to section 300.2, the definition of an indirect emission is an emission that is a consequence of an entity, but emitted by other entities. Indirect emissions are produced when stationary or mobile sources cause emissions to be generated elsewhere. For "registration" or recognition purposes, additional guidance is needed on how to avoid double counting. One conclusion that can be drawn is that this proposal regarding indirect emissions is very complicated and, as explained below, is of questionable value.

The focus of reporting should be on direct emissions and direct emissions reductions. The reporting and "registering" or recognition of indirect emissions and indirect emissions reductions should be optional. Specific problems or issues associated with accounting for indirect emissions and indirect emission reductions include:

- Reported values for direct emissions are usually either measurements or relatively accurate calculations of an entity's actual emissions, whereas indirect emissions are always less accurate estimates of changes in another entity's emissions.
- Indirect emissions are more complicated to quantify.
    - In a wholesale power market, marginal GHG emission rates vary by time of use, both daily and seasonally, as well as by region. These rates cover a broad range. For example, they could range from .5 tons per megaWatt-hour for a gas unit to 1.2 tons per megaWatt-hour for a coal unit.
    - In deregulated markets, there is no single utility that serves all load. Instead there is a mélange of retail providers, wholesale suppliers, and transmission and distribution companies that makes the calculation of indirect emissions and indirect emission reductions even more complex.
- Accounting for indirect emissions will always result in double-counting of direct emissions.

Electric generators should not have to assign or allocate specific units of output (and associated emissions) to particular customers or customer groups that want to quantify indirect emissions, either at the wholesale or retail level, but should have the option to do so. If an electric generator **opts** to assign a portion of the direct emissions from generators to purchasers, it should also report the portion so assigned as indirect emissions in order to account for all emissions from its generating units. Any reporting

in this manner should be additional to the reporting of all emissions of CO_2 from generation as direct emissions.

B. **Reporting of Purchased Power Emissions Should Be Optional.**

Section II.D of the preamble states:

> An entity-wide inventory would need to cover all significant. . .anthropogenic greenhouse gas emission sources within the entity's defined boundaries.
>
> * * * *
>
> Entity-wide reports must encompass, at minimum, all six greenhouse gases specified in the Guidelines, whether emitted directly by the entity's operations and facilities, **or indirectly in the generation of purchased electricity, steam or hot (or chilled) water used by the entity**.

68 *Fed. Reg.* 68208 (emphasis added). In Figure 1 of the preamble, the box on "Large emitters" states that such entities "must provide" entity-wide emissions "inventories" of "[i]ndirect emissions associated with purchased energy" and cites section 300.6(c). *Id.* at 68207. Section 300.6(c) states that to provide incentives to electricity users "to reduce demand," the reporting entity's "inventory" must include the "consumption" of purchased electricity, steam, and hot or chilled water "as indirect emissions." Section 300.2 defines "indirect emissions" to mean GHGs from stationary or mobile sources outside, not inside, the "organizational boundary" of the entity. Confusion arises with the use of the term "indirect emissions" vis-à-vis a reporting entity's "inventory" in light of the definition of indirect emissions in section 300.2. In section 300.6(c) and Figure 1, the use of the term is in the context of inside the boundaries of an entity. However, the defined term is in the context of outside the boundaries of an entity.

The voluntary reporting of purchased power emissions should not be required in order to "register" or recognize emissions reductions by large entities. Moreover, such reporting should not mandate inclusion of all GHGs.

C. Avoided Emissions Are Generally a Form of Direct Emissions Reductions.

As defined in the proposal, avoided emissions will be reportable and able to be "registered" or recognized for both large and small entities. The preamble states that avoided emissions must "reflect the indirect emission reductions achieved as a result of a measured increase in the net sales of energy generated by low- or no-emission technologies." 68 *Fed. Reg.* 68210. However, section 300.2 defines avoided emissions as "the emissions displaced by increases in the generation and sale of electricity, steam, hot water or chilled water produced from energy sources that emit fewer greenhouse gases per unit than other competing sources of these forms of distributed energy." Additional guidance for calculating avoided emissions will be released with the Technical Guidelines.

Avoided emissions are an essential component of the President's greenhouse gas intensity reduction goal of 18 percent by 2012. Through nuclear energy, renewable energy, and energy efficiency and demand-side management projects, the inclusion of avoided emissions in an entity's report for "registration" or recognition will be beneficial to any cumulative reductions in emissions or emissions intensity. Projects that realize

avoided emissions should also be reportable and "registered" or recognized within the unitary data base.

EEI fully supports the reporting and "registration" or recognition of avoided emissions in the proposed revised guidelines, but has several concerns with the DOE proposal. First, **the preamble language and C.F.R. definition stated above appear to conflict, and this apparent conflict should be resolved in favor of the simpler and more straightforward C.F.R. definition.**

Second, **DOE should clarify that avoided emissions are generally a form of direct emissions reductions** (as opposed to indirect emissions reductions). We acknowledge that this may not be the case when avoided emissions are reflected outside an entity's boundaries (*e.g.*, an increase in a utility's nuclear units could displace purchased power rather than on-system fossil fuel-fired generation). When avoided emissions occur outside an entity's boundaries, **avoidances are simply emissions reductions from a projected baseline rather than a historical baseline**. Such clarification would be consistent with the treatment of avoided emissions under the current guidelines. See App. A, GG-2 (68 *Fed. Reg.* 68221).

Third, **consistent with the concept that avoided emissions are generally a form of direct emissions, responsibility for reporting should be placed with the generator of emissions-free electricity.** This position also is consistent with the recommendation that

reporting of purchase power emissions should be optional. Entities that develop emissions-free generation may do so in part due to the potential market value of "green tags" or other forms of emissions-free attributes. By vesting responsibility for reporting the avoided emissions with the entity responsible for the project, the guidelines would enable the entity to retain whatever economic value is associated with the emissions-free generation project. In some cases, these attributes can be transferred to the power purchaser, as part of the terms of the transaction. This transfer can be accounted for through the optional reporting of purchased power emissions.

Regarding the calculation of avoided emissions, one option for quantifying these reductions – particularly when avoidances occur outside the entity's boundaries – is to use an average fossil fuel emissions factor. The method is similar to the one used in the current guidelines and would be a simple and comparable measure of emissions reductions calculations from emitting sources (such as coal-, natural gas- or oil-fired generators). If a non-emitting generation source were not on line, its power production would likely be replaced by an emitting fossil fuel-fired generator, since fossil fuel-fired generation is the most prevailing generation source and is almost always on line.

VIII. Certain Structural And Implementation Provisions Need Modification.

A. The Effective Date for the Revised Guidelines and Reporting of Emissions Reductions Should Be Guided by the Statute and Practical Considerations.

The President issued his directive to the DOE to "improve the current GHG Reduction and Sequestration Registry" in February 2002. White House Global Climate Change Policy Book, p. 9. White House expectations were high when the President called for proposed improvements within 120 days after that announcement. While the four-Agency letter observed that the creation of the current voluntary guidelines took about two years from the date of enactment, it said this revision effort "is considerably more complex" than creation of the current guidelines and proposed "an expedited process" that will "culminate in new guidelines by January 2004 (for reporting 2003 data)." Despite the best efforts of DOE, it is obvious that both the Technical and General Guidelines and the new EIA forms, which must be approved by OMB after public review, will not be finalized until much later in 2004 or possibly early next year. Since the current guidelines remain in effect and EIA has proposed that the current forms be extended from October 2003 – which extension we have urged be for two years, not one – it is important that DOE not rush to revise the guidelines and EIA not revise the forms in haste.

Notice of the proposed extension was issued on October 1, 2003 (68 *Fed. Reg*. 56626). The stated purpose is "to ensure that any data collection instrument is in place" while the current guidelines "are in the process of being revised." According to EIA, the proposed

extension was pending at OMB as of early February 2004. Despite EEI, EPICI, Southern Company and Ameren's recommendations for a longer extension, EIA is seeking only a one-year extension. However, OMB No. 1905-0194 expired as of October 31, 2003 (according to the existing forms), and EIA has not yet proposed new forms for public comment under the Paperwork Reduction Act of 1995. Presumably it will not do so until the General and Technical Guidelines are ready to be finalized. That could result in EIA needing another extension beyond October 1, 2004. In addition, the existing forms provide for collection of information on "commitments" to reduce GHGs and sequester carbon "in future years" under the current guidelines. The revised guidelines are silent on such "commitments." **DOE should explain its intentions with regard to the reporting of future commitments.**

All of this raises the issue of the effective date of the guidelines. As discussed above, the preamble explains that DOE plans to give notice of the termination of the current guidelines "on the same day that DOE publishes the notice" of the date the revised guidelines will be final, and that notice "will contain an effective date, which will be the beginning of a future reporting period." 68 *Fed Reg.* 68205. The preamble also refers to the "registration" or recognition of "emission reductions achieved after 2002" *Id.* at 68206. Assuming that, in fact, the guidelines and EIA forms are all finalized well before the end of 2004, **we suggest that the reporting date be not earlier than July 1, 2006,**

for data collected in calendar year 2005, noting the following comments of the Southern Company representative at the January 12, 2004, DOE workshop:[16]

> [E]ven with the schedule laid out by DOE now, it'll be well into 2004 before companies know what the requirements of the new guidelines are going to be.
>
> With that being the case, I would suggest that it's not feasible to have these new guidelines effective for reporting any time before calendar year 2005. Because companies will not know until well until 2004 what the requirements are, if they are not already collecting all of the data needed, they will not be able to report under the new guidelines.
>
> And I do want to distinguish between data that may have been collected for other reasons that they can go back and retrieve and then report with some extended filing opportunities, contrast that with data that just has not been collected.
>
> Once you get into 2004, there is no way to go back and collect data for activity that's already happened. And if they can't do that, they can't report under the new guidelines. If they can't report under the old guidelines, then there's a disconnect there.

Transcript, p. 105.

B. **The Base Year and Baselines Need Flexibility.**

Figure 1 (68 *Fed. Reg.* 68207) and section 300.5(a) provide that when an entity first reports, it must provide listed information in its "baseline entity statement." Under section 300.5(a)(7), that information includes "[i]dentification of the first year for which

[16] Section 300.9(c), "Definition and deadline for annual reports," specifies that entities should report "emissions on an annual basis, from January 1 to December 31" and that to "be included in the earliest possible DOE annual report of greenhouse gas emissions reported under section 1605(b), entity reports must be submitted to DOE not later than July 1 for emissions during the previous calendar year." The reports to EIA should, at a minimum, include emissions reductions, avoidances and sequestrations, since the only annual report of emissions is pursuant to section 1605(a); the annual report of emissions reductions, avoidances and sequestrations is pursuant to section 1605(b).

the entity will report emissions and the base year or base period from which emission reductions will be calculated." Section 300.5(b), which provides for changes in the statement, states:

> The dynamic nature of economic activity may pose a challenge for the objective of a comprehensive and accurate documentation of greenhouse gas emissions and sequestrations from year to year. In general, DOE encourages changes in the scope of reporting that expand the coverage of an entity's report and discourages changes that reduce the coverage of such reports unless they are caused by divestitures or plant closures. Any such changes should be reported in amendments to the Entity Statement and major changes in the reporting entity's base year or base period. The Technical Guidelines under this part provide more specific guidance on how such changes should be reflected in entity reports and emission reduction calculations.

This matter of "economic activity" and baselines was discussed at the January 12, 2004, workshop in an exchange among DOE officials, a Georgia Pacific representative and the facilitator:

> MS. ANDERSON: I'd like to clarify because I don't want misconceptions. . .to increase. When we get to the reduction side, we'll be talking about options that companies have for calculating those reductions. For some, it's going to be the intensity metric, which, you're absolutely right, will take into consideration these economic changes and will make those adjustments for increased or decreased output or -- so that emissions may – absolute emissions may in fact be increasing. But if output is increasing, the intensity may be going down, which is precisely in synch with what we're trying to achieve.
>
> Additionally, there may be another option to calculating reductions using absolute emissions. For some, that will be the more. . .useful choice. But in that case, we're still asking for some adjustments to the absolute emissions to take into consideration that. . .we're not registering reductions that are accruing due to a plant going overseas or a plant being closed.
>
> * * * *
>
> MR. FRIEDRICHS: You're correct in that those specific rules for adjusting baselines and so forth will be addressed in the technical guidelines that will be proposed. And. . .that's why we believe that there should be an

> opportunity to comment on these general guidelines in the context of those technical guidelines.
>
> MR. GALEANO: I appreciate your comment because that clarifies the confusion of mine. Clarify, no. It confuses me further because it is my simple-minded state, is that the general guidelines set the policy issues and set the directions of this activity and the technical guidelines complement in detail and calculation those general policy guidelines. If you don't establish the adjustments policies in the general guidelines, you're missing –
>
> MR. FRIEDRICHS: Actually, the general guidelines do describe. . . .the requirements for adjustments in baseline. They do not explain how those adjustments would be made. . .in specific calculations, but they do describe the necessity to adjust baselines for the various changes in activity.
>
> MR. BROOKMAN: The larger point, Sergio, is, without those technical guidelines, your comment on the general guidelines at least is incomplete and perhaps worse than that. Right?

Transcript, pp. 41, 42.

The procedures for "adjusting baselines" should be addressed in the General, not the Technical, Guidelines. In addition, **it is important to continue, as in the current guidelines, to allow flexibility in establishing baselines.**

Section 300.9 states, "Entities may report emissions and sequestration" (and presumably reductions and avoidances) "on an annual basis beginning in any year, **but no earlier than the base period of 1987-1990 specified in the Energy Policy Act of 1992"** (emphasis added). In the case of GHG emissions, section 1605(b)(1)(A) does specify a "baseline period of 1987 through 1990" and for "subsequent calendar years on an annual basis" for GHG emissions, but does not set a "baseline period" for GHG reductions referred to in sections 1605(b)(1)(B) and (C). The current guidelines state

> A primary purpose of the program is to record emissions reductions, not to track when projects were initiated. Therefore, you may report new or ongoing projects that have achieved reductions beginning January 1, 1991. However, for any project, you must establish a credible reference case. . . .

App. A, GG-5.9, 68 *Fed. Reg.* 68230. The current guidelines also indicate that "you should not use data earlier than 1987." Like the statute, the current guidelines do not refer to the "baseline period of 1987 through 1990" for reductions, avoidances and sequestrations. Clearly, the current guidelines are more in conformity with the statute. See also n. 10, *supra.*

C. The Definitions Section Needs One Addition and Some Clarification or Modification.

In general, the definitions in section 300.2 are helpful. **There was a suggestion at the January 12, 2004, DOE workshop that since there is a definition of a "Sub-entity," there should be a definition of an entity. That would not be useful, given the myriad number of organizations in the U.S. economic sectors that could be called "entities," and taking into consideration the fact that DOE is apparently aiming this program at reporting by individuals in some sectors, such as the agriculture and residential sectors**. The closest to a definition of entity is the first sentence in section 300.3. However, note that section 1605(b)(2) also refers to "persons" reporting information to the EIA data base, as well as "entities wishing to report such information." It appears that the terms "persons" and "entities" are used interchangeably. In addition, the current guidelines provide that reporters "must be a legal U.S. entity, that is, any U.S. citizen or resident alien; any company, organization, or group incorporated or recognized

by U.S. law; or any U.S. Federal, state, or local government entity." App. A, GG-3 (68 *Fed Reg.* 68222). **The revision does not explain why DOE did not include this provision, which may be closest to defining an "entity" in the revision. An explanation would be helpful.**

At the January 12, 2004, DOE workshop, the Nuclear Energy Institute (NEI) expressed concern with the phrase "legally distinct businesses, institutions, organizations or households" in section 300.9, which we share. Then NEI said:

> [O]ne of the things that is true in the electric industry is that in some cases holding companies have power plants that are themselves limited liability companies and in other cases holding companies do not. And so you get into a fairness issue of there – there could be a situation where a company that happens to have all of their power plants as legally separate companies could be reporting only one power plant at a time, and other companies that didn't have that structure because of regulatory issues and things that have happened over the last 100 years, it means that they cannot do that, and – and that seems unfair.
>
> There are some other situations where I think, particularly in the electric industry, it seems to me that a legal definition of a boundary may not necessarily be the best boundary for reporting, and let me give another example. Because in some states deregulation has occurred, you have situations where – and in other states it has not, you still have situations where companies may own generation as well as transmission, distribution, and services in the electric industry.
>
> And it may make sense for a company simply to be reporting the – the emissions from their generation, but they may not have the generation in a distinct, legally bound company.

Transcript, p. 14. In addition, a DuPont representative said that he shared "the concerns of everybody, including the electrical industry" and called for "maximum flexibility." *Id.* at 15. The absence of a definition affords that flexibility.

Regarding the definition of "Sub-entity," we are concerned with the words "which has associated with it emissions of greenhouse gases that can be distinguished from the [GHG] emissions of all other components of the same entity." The term "associated with" suggests that the sub-entity must emit GHGs, which is not true for non-emitting sources in the electric utility industry, such include nuclear plants, renewable generators (*e.g.*, hydroelectric plants and wind farms), and energy service companies engaging in energy efficiency and demand-side management projects. **The "which" clause cited above does not appear to be needed.**

There are definitions of "emissions" and "sequestration," but not of "reductions." We recall informal discussions with DOE where its officials agreed that the term "reductions" should include reference to avoidances and sequestrations, as well as reductions. Yet a review of several sections of the proposed revision suggests the opposite, except in one section. For example, section 300.1(a) refers to "emission reductions, and sequestration activities," and sections 300.1(b)(1) and (2) on "registration" and reporting refer to "emissions" and "emissions reductions" with no mention in either of avoidances and sequestrations. Similarly, section 300.9(a)(1) refers to "emissions and sequestration" without mention of reductions and avoidances. Section 300.12(b) is headed "Registration of emission reductions," with no mention of avoidances and sequestrations. The lone exception is section 300.8(e), headed "Determining the entity responsible for emission reductions," where all three terms are utilized.

A definition of "reductions" that, for the purpose of the guidelines, means "emission reductions, avoided emissions, and sequestrations" is useful and needed. While the proposed revision defines "avoided emissions," to our knowledge it is only used in section 300.8(e).

The term "source" is used in the definitions of direct and indirect emissions, and those latter terms are used in the definition of emissions. In the case of both direct and indirect emissions, the reference is to "stationary or mobile sources," which are of a physical nature. However, the definition of "source" is in terms of a "process" occurring at a "location," "locations" or "area." It is a rather odd definition for use with the terms "stationary" and "mobile." In addition, to our knowledge the term "source" is otherwise used only in section 300.5(a)(5), when referring to a "description of the types of operations, facilities, processes, vehicles and other emission sources or sinks." **Given its limited use, the definition of source may not be needed. At the very least, it should be redefined.**

Section 300.2 defines the term "DOE" to mean the U.S. Department of Energy "and, as appropriate in context, includes" EIA. We are concerned about this definition for several reasons. First, the use of the word "include" suggests that there may be other agencies contemplated to be within the definition in addition to EIA. Yet the definition gives no hint as to their identity. Possibly, DOE intends to include EPA or other agencies referred to in the preamble (section II.0.8) where DOE solicits "comment on the merits of using

the 1605(b) program for documenting progress of participants in voluntary Federal programs towards meeting their emissions reduction goals." 68 *Fed. Reg.* 68213. While we might view such use as worthwhile, it is certainly not a use covered by the plain words of the statute. In any event, **the guidelines should not define DOE to "include" EPA or the Department of Agriculture.**

Second, we are concerned about the ambiguous and uncertain phrase "as appropriate in context." Section 1605(b)(1) provides for the Secretary to issue the guidelines establishing "procedures" for "accurate voluntary reporting," and section 1605(b)(4) provides that within 18 months after enactment, the DOE Secretary, "through" the EIA, was to "establish a data base" for voluntary reports of "information." EIA is also directed under section 1605(b)(2) to develop reporting forms.

The clear intent of these provisions is that DOE is to issue the guidelines, while EIA is to administer the data base and related reporting. However, the proposed guidelines are confusing as to the roles of each under the statute. This is particularly true with regard to section 300.9(c) concerning the exceptions to the deadlines for reports, section 300.10(a)(1) concerning the certification that information reported is "complete and accurate," and sections 300.12(a) and (b) concerning acceptance and "registration." Each of these "in context" dictates that the term "DOE" means EIA. It would be inappropriate for DOE to try to take some of these reporting and data base functions from EIA for itself. In the next revision, **DOE should abandon this rather strange**

definition and in the above-noted and other sections should substitute "EIA" for "DOE."

D. The Double Counting Provisions Are Both Impractical and Unreasonable.

Section 300.6(c), headed "Inventories of indirect emissions associated with purchased energy," provides that in order to provide a "clear incentive" for reducing demand by electricity users and other forms of purchased energy, "the consumption of purchased electricity, steam, and hot or chilled water must be included in a reporting entity's inventory as indirect emissions." It adds that to "avoid double counting. . .the reporting entity must report all indirect emissions (as defined in § 300.2) separately from its direct emissions." As noted in section VIII.B above, the definition in section 300.2 of "indirect emissions" refers solely to GHG emissions from "stationary or mobile sources outside the organizational boundary of an entity." The definition adds that it includes the "generation of electricity, steam and hot/chilled water, that are the result of an entity's energy use or other activities." It is unclear how this section applies to any significant mobile sources.

Section 300.8(e), headed "Determining the entity responsible for emission reductions," provides that the "legal owner of the facility, land or vehicle which generated the affected emissions, generated the energy that was sold so as to avoid other emissions, or was the place where the sequestration action occurred" is "presumed to be responsible" for the emissions reductions, avoided emissions or sequestrations. (However, it also provides

that "DOE will presume that an entity is not responsible for any emission reductions associated with a facility, property or vehicle excluded from its entity statement.") There is no indication in the section as to how a non-owner entity that wants to claim the reductions may overcome the responsible-entity presumption. Preamble section II.F (68 *Fed. Reg*. 68209) suggests that the presumption "can be altered" is if there is a "written agreement."

In the case of "shared" ownership, which is not defined, the section provides that there should be an "agreement between the entities involved in order to avoid double-counting." Whether entities would take the time and effort to negotiate such an agreement in light of the voluntary nature of the reporting and the lack of clarity as to what contributes "special recognition" is a serious question, although we agree that entities having contractual arrangements is a good approach regardless of whether there is shared ownership, control, etc. In addition, there is no discussion of situations where the entity is not the "owner" but has a controlling interest.

What is of concern with respect to double counting is the related requirement of certification of reports by entities, particularly regarding indirect emissions and in light of 18 U.S.C. § 1001. The preamble, but not the revised guidelines, provides that

> a reporting entity would have to certify that none of the reported emission reductions were: Double counted by the reporting entity (or, to its knowledge, **by any other reporting entity**); or were the results of shifts in operations or activity from one part of the entity to another part of the entity, or to outside the boundaries of the entity.

Section II.H., 68 *Fed. Reg*. 68209 (emphasis added). This requirement applies equally to direct and indirect emissions. It is overkill.

Moreover, section 300.10(a)(1) provides for certification that the "information provided" in accordance with the revised guidelines "is complete and accurate" and "consistent" with prior reports. No mention is made about certification regarding double counting. While we have expressed concerns about the use of the term "complete," certification as to the accuracy of the information is appropriate. However, **expecting entities to certify whether there is double counting by "any other reporting entity" is unreasonable**, even with the qualifying language "to its knowledge," absent some directly relevant contractual arrangement. An entity is unlikely to know or even anticipate what other entities are reporting from year to year. This issue was addressed at the January 12, 2004, DOE workshop as follows:

> Bob Schenker, General Electric – concern about over counting. The biggest over counting that's going to occur in this program is the electric power. We're asked – as a manufacturer. . .to include our indirect emissions from electric power use. All of the power producers in the room are also reporting.
>
> Is it going to be our responsibility as a manufacturer to reach an agreement with every single one of the utilities we deal with as to figure out who's going to report these emissions and who isn't, or is DOE and the 1605(b) program or EIA, whoever's involved, going to separate out these emissions? How is that going to be managed? Because I think, if you're concerned about double counting, that's the big one that's going to occur.

Transcript, p. 20.

EEI member companies are likely to have large numbers of customers who might report under section 1605(b). **Even if the other reporting entity is known, expecting both entities to devote time and resources to cross-check their reports is both impractical and unreasonable. Multiply this scenario by hundreds of reporting entities and thousands of possible other reporting entities, and the situation quickly becomes untenable on a national scale.** At the January 12, 2004, DOE workshop, the Southern Company representative specifically noted the "onerous" nature of the double-counting certification and indicated that it was "totally infeasible" for power generators to have agreements and understandings with each of their customers as to what the generators and customers may be reporting. Transcript, pp. 24-25.

IX. International Projects Should Receive The Same Treatment As Domestic Projects And Entity-wide Actions.

Earlier comments from EPICI explained why international projects should receive the same treatment as domestic projects and entity-wide actions.[17] Unfortunately, the proposed revision does "not address" the reporting of international emissions reductions but instead seeks comments about whether they "should continue to be eligible for reporting" and "should qualify for registration" and, if so, under what procedures. Preamble section II.O.7, 68 *Fed. Reg.* 68213.

[17] See n.6, *supra*, at section 5, "Continued recognition of project-based reporting," pp. 12-13.

Participants at the January 12, 2004, DOE workshop strongly supported the reporting of international projects. Transcript, pp. 96-99. Preamble section II.O.7 notes that **since 1994 "DOE has interpreted the Congressional intent underlying the statute to allow" such reporting**. 68 *Fed Reg.* 68213 n.1 (emphasis added). **It would indeed be curious if DOE were to retreat from this position in revising the 1994 guidelines, particularly when one of the Administration's objectives is to improve them. If the final revised guidelines retreat from the current guidelines and EIA forms, in which international and domestic projects have continued to enjoy equal status, it would be a severe and unjustified blow to reporting on, and participating in, voluntary programs.**

We understand that the primary focus of the President's climate plan is on the reduction of U.S. GHG intensity. However, GHGs know no geographical boundary, and thus reducing, avoiding or sequestering GHGs overseas is effectively the same as doing so in the U.S. Moreover, section 1605(b) is part of title XVI of EPAct, which is entitled "Global Climate Change." In enacting this title, Congress did not intend to limit its provisions to the U.S. (except when specified).

Other compelling reasons for "registering" or recognizing power companies' and other reporters' international projects are:

1) The U.S. is bound by the Framework Convention on Climate Change (FCCC), with its provisions for activities implemented jointly (AIJ) under the U.S.

Initiative for Joint Implementation (USIJI) and the Department of State's implementing groundrules.[18] It is inconceivable that AIJ activities could not be "registered" or recognized under the revised guidelines merely because they occurred outside the U.S.

2) The President's February 14, 2002, climate policy statement included a section entitled "Promote New and Expanded International Policies," which said, "The President's approach will actively pursue the integration of our domestic goals and policies with those of other nations" (p. 18). In the same week the White House recognized the importance of international projects in reducing, avoiding and sequestering GHGs when the Council of Economic Advisors said:

> Project-based measurement. . . .is important internationally if the U.S. wants to encourage domestic firms to seek out meaningful reductions in developing countries where fully market-based programs are unlikely to be implemented.[19]

3) The same reasons that support the President's policy statement on transferable credits and baseline protection also apply to international projects, namely, that a) recognition of transferable credits or baseline protection for international projects provides additional incentive for entities to undertake these actions, resulting in additional reductions, and b) conversely, lack of recognition would create uncertainty regarding the acceptability of these

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[18] The State Department's USIJI groundrules were published at 59 *Fed. Reg.* 28442-46 (1994).

[19] Council of Economic Advisors, Economic Report of the President 2002 at 248 (Feb. 2002).

actions, and thus hinder participation in them. The inclusion of international projects will result in a net increase in reductions, a supplementation of – not a substitution for – domestic actions. Conversely, **responding to a question raised in the preamble of the December 5, 2003, notice, 68 *Fed. Reg.* 68213, excluding international projects from reporting or registration would result in a net decrease in reductions.**

4) International projects are consistent with sustainable development programs that the U.S. is undertaking in the wake of the World Summit on Sustainable Development (2002) and the Delhi Declaration on Climate Change and Sustainable Development (eighth meeting of the FCCC Conference of the Parties, 2002).

As explained in section III.B above, the revised guidelines should treat reductions – whether based on projects, domestic or international, or on entity-wide accounting – in the same or comparable manner and to the same extent in reporting so that one is not favored or disadvantaged over the other. **It would be ironic indeed if the DOE revised guidelines treated international projects worse than they are dealt with under the Kyoto Protocol's project-based market mechanisms** (*i.e.*, clean development mechanism (CDM) and joint implementation (JI)).

With respect to other issues and questions raised in the preamble, our responses are the same as we provided at the January 12, 2004, DOE workshop:

- We cannot think of any issues where the recognition or "registration" of international projects is different from the recognition or "registration" of domestic projects. For the power sector, the same reporting issues arise for energy projects and sequestration projects, whether they are located in the U.S. or overseas.
- Similarly, we do not believe that certifying the accuracy of data may be more complicated for international projects. On the contrary, Ronald Shiflett, the executive director of International Utility Efficiency Partnerships and International Power Partnerships, informs us that emissions reductions monitored and verified in projects located outside of the U.S. will use the same methodology as that employed in on-shore GHG reductions projects. In many cases, U.S. engineering firms will perform this work, and data and test results are easily transferable between the on-shore corporate divisions and the international operating project management or between the internationally based project manager and an independent verification agent, if one is subcontracted for this purpose. In a world interconnected by high-speed voice and data communication capability, and with standardized engineering and analytical methodologies used to evaluate the achievement of specific greenhouse gas reduction in projects located outside of the U.S., there is no additional complication or burden required for a project whether it is located in America, Central America, South America or elsewhere in the world.

Thus, **responding specifically to another question raised in the preamble, we do not believe reports of international projects should require independent verification.**

X. Several Other Reporting Provisions Need Clarification Or Modification.

A. The Reporting and Record-keeping Provisions Raise Some Concerns.

Section 300.1(a) states:

> The purposes of the Guidelines are to establish the procedures and requirements for filing voluntary reports, and encourage corporations, government agencies, nonprofit organizations, households and other private and public entities to submit annual reports of their net greenhouse gas emissions, emission reductions, and sequestration activities. . . .

Section 300.9 on reporting and record-keeping provides in subsection (a)(1) that only "[e]ntities may report emissions and sequestration on an annual basis." However, as discussed in section VIII.B above, section 1605(b) of EPAct refers to both "persons" and "entities" with regard to reporting, and the current guidelines appear to ignore reporting by "persons." In addition, like section 300.1(a) of the proposed revision, section 300.9(a)(1) should include mention of reporting of "emissions reductions" as well as "emissions and sequestrations." As discussed in section VIII.B above, **a definition of "reductions" could resolve this issue.**

Moreover, section 300.9(a)(1) states, "To be recognized under these revised Guidelines, all reports must conform to the measurement methods" that are to be established by DOE in the future "by the Technical Guidelines." As noted above, this "requirement" is to

apply to future reporters, as well as to "entities" reporting under the current guidelines. Since we do not yet know the nature and details of this DOE "requirement," it is not possible to provide any meaningful comments.

Furthermore, the reference to conforming to "measurement methods" is confusing in light of section 300.12(a) on acceptance of reports, which provides for "review" of "all reports to ensure they are consistent with the revised Guidelines," both General and Technical, not just "measurement methods." Reports are accepted if DOE/EIA "determines the report follows the definitional, measurement, calculation, and certification Guidelines." Clearly, the word "measurement" is only one of the matters covered by that determination. **In short, the criteria in the second sentence of section 300.9(a)(1) do not appear to relate to the criteria in section 300.12. They should. Possibly, the second sentence of section 300.9(a)(1) should be deleted, particularly since it does not have any relevance to the purpose of the section, namely "Starting to report." In addition, it is unclear whether the reference in the third sentence of section 300.9(a)(1) to this "requirement" is intended to apply to the first sentence, second sentence or both sentences.**

In the case of record-keeping, section 300.9(d) states, "Entities must maintain adequate records for at least three years to enable independent verification of all information reported." It also provides that records "must include" four listed measures as part of the

records. While the three-year requirement is not a part of the current guidelines, it does not appear unreasonable. However, we are concerned about the term "adequate," which is quite vague and subjective, particularly in light of the certification requirements of section 300.10, the apparent application of 18 U.S.C. § 1001 to reporting, and the use of the term "include" in referring to the four measures. Presumably, the purpose of the three-year requirement is to ensure that reporting material relied upon by the volunteer is maintained. If so, use of the qualifier "adequate" is unnecessary. Retaining it would add subjective and superfluous elements to the maintenance concept. Moreover, the word "include" implies that the list could be expanded by DOE or EIA on a case-by-case basis. In short, vague, subjective and open-ended terms such as "adequate" and "include" should be avoided.

The reference to "independent verification" is also of concern because it is unclear what it encompasses and because of the provisions of section 300.12(c) on public access. At the January 12, 2004, DOE workshop some participants talked about obtaining access to the supporting materials for reports filed with EIA. We are concerned that the term "independent verification" could be 1) used by EIA or DOE to require third-party verification and 2) a basis for claims that persons having access to the EIA data base also have access to a volunteer's records. **The maintenance of records should be for purposes of sections 300.12(a) and (b) only and not for purposes of "independent verification."**

Furthermore, there may be little or no value to volunteers in requiring them to maintain such records if, pursuant to section 300.1(b)(2), they are unable to gain "special recognition" should they choose to report.

B. Certification in Accordance with the Current Guidelines Is Sufficient Under the Statute.

Section 1605(b)(2) of EPAct states:

> Persons reporting under this subsection shall certify the accuracy of the information reported.

The current guidelines provide (App. A, GG-8 (68 *Fed Reg.* 68231)):

> If you report under this program, you will be required to certify through your signature the accuracy of all the information reported. Therefore, the person who signs the report must be authorized to act as a representative of the reporting entity for these purposes. No independent certification is required, and the Federal government does not plan to certify your reports. However, you may wish to indicate if your data have been verified by a third party.

Section 300.10(a) provides that the "chief executive officer, agency or household head, or person responsible for the reporting entity's compliance with environmental regulations" is to certify that the information reported on EIA forms

> is complete and accurate, in accordance with DOE's revised Guidelines, and is consistent with all prior year reports submitted by that entity (unless otherwise indicated); and
> . . .Adequate records will be maintained for at least 3 years to enable independent verification of the information reported.

Regarding the details of what the certification covers, we have discussed above with respect to section 300.9(d) our concerns about the term "adequate" and

"independent verification." These concerns apply equally to this section. As to the requirement that the person certify that the information is "consistent with all prior year reports," this issue is sufficiently covered by the words "in accordance with DOE's revised Guidelines"; there is no reason to single out this one item of the guidelines for special consideration.

With respect to the requirement that the person or entity certify that the information is both "complete" and "adequate," we have concerns with the word "complete" since it is unclear what is intended and goes beyond the statutory provision for self-certification. It is rather a vague and subjective term. It is also covered by the phrase "in accordance with DOE's revised Guidelines" and should not be separately articulated. Moreover, section 1605(b)(1) uses the term "accurate" in providing that the guidelines establish "procedures" for reporting, and section 1605(b)(2) uses the term "accuracy" regarding self-certification. As previously noted, the word "complete" is not a statutory requirement. **The word "accurate" is sufficient for voluntary reports.**

With regard to who certifies, the provisions of the current guidelines quoted above are more than adequate and appropriate, particularly since, as we have above noted, the volunteer certifier is probably subject to 18 U.S.C. § 1001. In the first place, the revision contemplates volunteers submitting reports from corporations, associations, partnerships, and individuals, both profit and nonprofit, as well as government agencies and other forms of private and public legal entities. As such, the C.F.R. language referring to chief

executive officer (CEO), agency or household head, and person responsible for environmental compliance is probably inadequate to cover all of the possible volunteers. Some volunteers could have a CEO but not an environmental compliance officer, because they either are not subject to environmental regulations or have no designated environmental compliance officer, with the result that the onerous burden would fall on the CEO. Others may not have an agency or household head, environmental compliance person or a CEO.

Where there is a CEO, there is no reason to single out that person as the certifier. At the January 12 workshop, one nonprofit representative said that the proposed CEO requirement is "quite onerous" and "tantamount to verification." That person concluded that "no one would do so." We fully agree, and remind DOE that this is a congressionally mandated program for use by volunteers, not regulated entities. As we indicated at the January 12, 2004, DOE workshop, **the section 1605(b) program is a voluntary one, and is not governed by the Sarbanes-Oxley Act, which covers mandatory financial and securities information.** Moreover, as others at the workshop noted, **even mandatory reporting under environmental regulatory statutes such as title V of the Clean Air Act do not require the CEO to sign the reports.** Indeed, section 503(c) of that Act, which addresses permit applications, requires a signature by a "responsible official, who shall certify the accuracy of the information submitted," not the CEO.

Thus, we reiterate that the provision in the current guidelines is not only preferred, but essentially required if DOE realistically expects participation by EEI member companies.

C. Independent Third-party Verification Should Continue To Be Optional and Not Prescribe Requirements for Verifier Independence and Qualifications.

Unlike the current guidelines, section 300.11(a) proposes to encourage entities to have their reports "verified by independent and qualified auditors," defines what the terms "Independent" and "Qualified" mean, and describes the types of national organizations that might perform this function. Section 300.11(b) states what this so-called "verifier" must provide to the "encouraged" entity and what the extent of the verifier's certification to that entity is. All of these DOE requirements would add transaction costs, and it is the entity that must select and pay for the verifier, with no apparent reimbursement by DOE.

In the preamble, DOE explains that the proposed revision provides "only general guidance on what DOE considers necessary qualifications of verifiers and the information that they must verify." 68 *Fed. Reg.* 68210. DOE adds that the "guidance is intended to provide some assurance" of the independence and qualifications of verifiers, "while still giving entities considerable flexibility in the selection of the" appropriate "firm." DOE invites comments on whether it has achieved that "objective." In addition, while DOE believes that "requiring a senior officer to certify reports will provide

adequate assurance" of reliability, the revision "would strongly encourage reporters to obtain independent verification."

The only statutory authorities cited in the December 5, 2003, notice for the guidelines revision are the DOE Organization Act and section 1605(b) of EPAct. We are not aware of any basis in either law for DOE to provide more than just encouragement that the volunteers provide for use of independent verifiers for all or part of their reports. The DOE attempts to define the terms "Independent" and "Qualified," give examples of professional organizations that DOE believes are "Qualified" as verifiers, and specify what a verifier "must" provide and "must" certify for the reporting volunteer all exceed DOE authority under such law. Such language in the C.F.R. is more than mere "guidance." It mandates what verification must be if the volunteer opts to accept the encouragement.

Section 1605(b)(4) expressly provides for self-certification by the volunteer, making it very difficult for DOE to find a basis in that section for such detailed requirements governing "encouraged" third-party verification that the volunteer must select and pay for. Moreover, DOE provides no estimate of what such so-called "guidance," if followed, is likely to cost any volunteer. Indeed, governmental volunteers may view these DOE provisions as tantamount to an unfunded mandate.

In short, in response to the specific invitation from DOE for comments, **this so-called "guidance" on verification should be abandoned. Again, the guidance in the current guidelines that volunteers "may wish to indicate that their data have been verified by a third party" is more than sufficient**. App. A, GG-8 (68 *Fed. Reg.* 68231). Surely, if a volunteer wants such third-party verification, it will know how to accomplish it. This is a private market function, not a governmental one. The government has no business telling private parties and markets how such voluntary transactions should be conducted.

D. Concerns about Public Accessibility and Confidentiality Need To Be Addressed.

The current guidelines state, "In general, information submitted to the Federal government must be made available to the public." App. A, GG-7 (68 *Fed. Reg.* 68231). However, they also explain that the "provisions of section 1605(b)(3) stipulate that 'Trade secrets and commercial [or financial] information that is privileged or confidential shall be protected as provided under Section 552(b)(4) of Title 5, United States Code,'" the so-called confidential business information exemption to the Freedom of Information Act.

Proposed section 300.12(c) provides that EIA will establish a "publicly accessible data base composed of all reports that meet the definitional, measurement, calculation and certification requirements of these Guidelines." However, there is no mention of the confidentiality provision of section 1605(b)(3) of EPAct. Since the DOE intent is to replace the current guidelines with these guidelines for post-2001 (or post-2002)

voluntary reports, **it is important that the public and the volunteers know when reading the final version of the new guidelines that these confidentiality provisions apply, just as they had for the current guidelines. At a minimum, the revision should reiterate the statutory requirement and maintain the same level of confidentiality protection as volunteers currently have.**

E. **The Provisions on Acceptance of Reports Need To Be Modified.**

First, the DOE proposal is inconsistent in how it treats reports and "registration." In Figure 1 (68 *Fed. Reg.* 68207), the preamble clearly states that **EIA** accepts the report (reported reductions), and **EIA** also accepts the report and "registers" eligible emission reductions ("registered" reductions). See also *id.* at 68210 (Report Acceptance). However, sections 300.12(a) and (b) clearly state that **DOE** accepts the reports and that **DOE** will "register" emission reductions. See also section 300.9(c). Section 300.12(c), "EIA database and summary reports," refers to EIA establishing "a publicly accessible data base" and states that a portion of the data base will provide a "summary" of information on emission and "registered emission reductions," but not a "registry." The term "registry" does not appear, and nowhere in the current guidelines or the proposed revision is a "registry" named or its purposes and functions identified.

Second, proposed section 300.9(c) provides that entities "should report emissions on an annual basis, from January 1 to December 31, although DOE may grant exceptions to these dates." The section does not explain how such exceptions would be granted,

whether they would be automatic and, if not automatic, what criteria would be applied. Possibly, this is to be addressed as part of the Technical Guidelines. The section then provides that to "be included in the earliest possible **DOE** annual report of greenhouse gas emissions reported under section 1605(b), entity reports must be submitted to **DOE** no later than July 1 for emissions during the previous calendar year" (emphasis added).

Missing from this section is any reference to the timing of the submission of emissions reductions and sequestration reports. Yet we presume that is relevant to the acceptance and "registration" of reports under sections 300.12(a) and (b) and to their public accessibility under section 300.12(c). The reference to the July 1 date is meaningless for purposes of the EIA annual report if there has been no acceptance or incomplete acceptance of entity reports by that date. In addition, we understand that the only annual report under section 1605(b) is the **EIA** report, Voluntary Reporting of Greenhouse Gases, which "records the results of voluntary measures to reduce, avoid, or sequester greenhouse gas emissions." EIA, Voluntary Reporting of Greenhouse Gases 2001, p. ix (Jan. 2004). **This section needs further clarification with respect to the above identified issues and the confusion over whether EIA or DOE is to accept reports and "register" or recognize reductions.**

Section 300.12(a) states, "Upon receipt, DOE will review all reports" (which presumably includes reports that do not comply with the "requirements" of sections 300.6 and 300.7) and prior reports "to ensure they are consistent with the revised Guidelines." If DOE

"determines" that the submitted report "follows the definitional, measurement, calculation and certification Guidelines, the report will be accepted." As noted above, there is no mention in either this section or section 300.9(c) as to when emission reduction reports must be submitted to trigger this review. The aforementioned July 1 date does not appear to be related to section 300.12(a). Again, there is conflict over whether DOE or EIA is the proper accepting body. Under the statute, it appears to be EIA.

Section 300.12(b) provides that DOE will review reports that have been "accepted" 1) "to determine any eligible emission reductions that were calculated using the reporting entities' base year emissions (no earlier than 2002) or the average annual emissions of its base period (a period of up to four sequential years ending no earlier than 2002)," and 2) "to ensure that the reports meet other relevant DOE requirements." **Presumably, the phrase "relevant DOE requirements" refers solely to the requirements of the revised guidelines and not some other unspecified "requirements." However, that should be clarified.** And, of course, the conflict between DOE and EIA being the "registration" or recognition body must be resolved, presumably in favor of EIA.

Section 300.12(b) then provides that DOE is to review its records to "verify that the entity has submitted accepted annual reports for each year between the establishment of the base year or base period and the year covered by the current report." Finally, the section provides for DOE notification that the "reductions that meet these requirements

have been registered," which seems to suggest that DOE might determine that some "reductions" in a report "meet these requirements" and some may not. The section is silent about notification that the reductions do not meet the requirements.

We have several concerns. First, **there is the recurring issue of the roles of DOE and EIA clarification. These must be clarified, presumably in favor of EIA**. Second, there are no prescribed time frames for the making of these several determinations, which could be a concern. Even if there are sufficient resources at EIA (or DOE), there is a concern that the volunteers could find the government taking an inordinately long time to make such determinations, which is not in their interest. **We suggest that such determinations be completed within 60 days from receipt of the report.**

Third, **while section 300.12(b) provides for notification about registration, there is no similar provision for notification of acceptance. There should be**. In addition, it is unclear whether the notification must be in writing, with an explanation of the determination, or whether it may be made verbally. Fourth, there are no apparent procedures for review of one or more determinations by the volunteer should the determination be negative in whole or in part. Since the volunteer has utilized resources in reporting, the person or entity should be able to challenge any negative determination. **There needs to be due process.**

F. **DOE Should Strive to Minimize Transaction Costs.**

Recommendation number 10 of the four-Agency letter called for the minimization of "transaction costs for reporters," as well as "administrative costs for the Government." As indicated in sections VI and VIII of these comments, we have identified a number of provisions in the DOE proposal that are resource intensive and that impose added transaction costs in terms of money, time, personnel and other costs. In section X.E above we referred to added transaction costs associated with independent third-party verification. These provisions and proposals are inconsistent with the four-Agency letter recommendation. We have urged changes to reduce or even eliminate such transaction costs, which will not compromise the other four-Agency letter recommendations. We reiterate here the need for DOE to take heed of those changes.